

No. 7102

United States
Circuit Court of Appeals
For the Ninth Circuit

HARRY D. McCLEARY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana.

FILED
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PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Attorneys, Names and Addresses.....	1
Answer	8
Assignment of Errors.....	120
Bill of Exceptions.....	13
Caption	2
Complaint	2
Citation	124
Clerk's Certificate to Transcript.....	127
Judgment	11
Notice of Appeal.....	117
Order Allowing Appeal.....	122
Petition for Appeal.....	118
Praecipe for Transcript.....	126
Verdict	11

INDEX TO BILL OF EXCEPTIONS

	Page
Introductory	1
PLAINTIFF'S CASE:	
DR. DUNCAN L. ALEXANDER,	
Deposition	
Direct Examination	33
Cross-examination	37
Redirect Examination	39
Recross Examination	40
DR. JAMES D. HOBSON	
Direct Examination	47
Cross-examination	51
Redirect Examination	53
MRS. E. M. McCLEARY	
Direct Examination	40
HARRY D. McCLEARY	
Direct Examination	14
Cross-examination	19
Redirect Examination	25
JOSEPHINE McCLEARY	
Direct Examination	28
Cross-examination	30
Redirect Examination	32
DR. G. D. WALLER	
Direct Examination	42
Cross-examination	45
Plaintiff Rests	54
Defendant's Motion for a Directed Verdict..	54
Motion for Directed Verdict Denied Pro	
Forma	56

Index	Page
DEFENDANT'S CASE	
DR. HERBERT C. WATTS	
Direct Examination	56
DEFENDANT'S EXHIBITS:	
1—Report of Physical Examination.....	59
2—Application for Compensation.....	65
3—Honorable Discharge McCleary.....	71
4—Follow-up Reports	69
5—Report of Physical Examination.....	76
6—Certificate of Dr. Blair.....	85
7—Report of Physical Examination....	87
8—Report of Physical Examination....	92
Defendant Rests	101
Testimony Closed	101
Defendant's Motion for Directed Verdict Re- newed	102
Opinion of Court Directing Verdict for De- fendant	102
Submission of Proposed Bill of Exceptions..	115
Service of Proposed Bill of Exceptions.....	115
Stipulation for Settlement Bill of Exceptions	115
Certification by the Court to Bill of Excep- tions	116

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

MESSRS. SMITH, MAHAN & SMITH, of Helena,
Montana,

MR. HOWARD TOOLE, of Missoula, Montana,
and

MR. W. E. MOORE, of Missoula, Montana,
Attorneys for Plaintiff and Appellant.

MR. WELLINGTON D. RANKIN, United States
Attorney,

MR. D. L. EGNEW, Assistant U. S. Attorney,

MR. SAM D. GOZA, JR., Assistant U. S. Attorney,
and

MR. D. D. EVANS, Chief Attorney U. S. Veterans
Administration,

All of Helena, Montana,

Attorneys for Defendant and Appellee. [1]*

*Page numbering appearing at the foot of page of original certified
Transcript of Record.

In the District Court of the United States in and for
the District of Montana.

No. 1557

HARRY D. McCLEARY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

BE IT REMEMBERED, that on April 26, 1932,
the plaintiff filed his complaint herein, in the words
and figures following, to-wit: [2]

In the District Court of the United States, in and
for the District of Montana, Missoula Division.

No. 1557

HARRY D. McCLEARY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT AT LAW.

Comes now the plaintiff above named and for
cause of action against the defendant, complains
and alleges:

I.

That the plaintiff was at all times herein mentioned and now is a citizen of the United States of America and a resident of the State of Montana.

II.

That on or about the 29th day of March, 1917, at Miles City, Custer County, Montana, the above named plaintiff enlisted and was inducted into the armed forces of the United States of America, defendant, with the grade of Private, and served the United States of America in the Infantry Division from the date of his enlistment to and including the 9th day of May, 1919, and was during all of said time employed in active service of the United States of America under the direct supervision of the War Department in the war with Germany and her Allies.

III.

That on or about the month of December, 1917, the plaintiff herein made application for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress and the regulations of the War Risk Insurance Bureau established by said Act for the sum of \$10,000.00; that there- [3] after and during plaintiff's term of service under the War Department as aforesaid, there was deducted from his monthly pay for such service for the United States of America, defendant, through its proper officials, the monthly premiums upon said War Risk Insurance provided for by said Act and all rules

and regulations promulgated thereunder by the Bureau of War Risk Insurance and by the Director thereof.

IV.

That during the period of plaintiff's service and as the direct and proximate result of such service, the plaintiff was injured and suffered the following diseases, to-wit: On or about the 26th day of October, 1918, plaintiff was gassed by inhaling poisonous gasses into his lungs, while fighting in the Meuse-Argonne Offensive in France; that on or about November, 1918, plaintiff became afflicted with and suffered from influenza; on or about January, 1919, plaintiff became afflicted with and contacted chronic active pulmonary tuberculosis and has been afflicted with and suffered from chronic active tuberculosis continuously since on or about January, 1919; that as the direct and proximate result of said injuries, diseases, the sequela thereof and the disabling effects therefrom, plaintiff became permanently and totally disabled on May 9, 1919, ever since has been, and now is permanently and totally disabled; that as the direct and proximate result of said injuries, diseases, the sequela thereof and the disabling effects therefrom, plaintiff has been unable to follow any occupation whatsoever since May 9, 1919, and that said injuries, diseases, the sequela thereof and the disabling effects therefrom are of such a nature and character so as to render it reasonably certain that the plaintiff will be unable to follow any occupation and that the permanent and

total disability of plaintiff will continue throughout his lifetime. [4]

V.

That the plaintiff was on the 9th day of May, 1919, honorably discharged from the United States Army and from the service of the United States of America as aforesaid.

VI.

That the plaintiff on or about December 23, 1930, made a written demand upon the United States of America through the Veterans Administration of the United States and the director thereof for the benefits of said insurance and for the monthly payments due under the provisions of said War Risk Insurance Act for permanent and total disability; that the said Veterans Administration and the said director thereof in an opinion by the Insurance Claims Counsel dated November 30, 1931, denied the said claim of plaintiff to the benefits of the War Risk Insurance Act and refused to grant plaintiff said benefits, and in the letter of notification to this plaintiff stated, quote: "You may consider such denial final for the purpose of instituting a suit," and said Veterans Administration, the said Director thereof, the Administrator of Veterans Affairs and the defendant herein has continuously refused and does wholly refuse to grant plaintiff said benefits and there is now a disagreement existing between the plaintiff and the United States Veterans Administration and the Administrator thereof within

the meaning of the War Risk Insurance Act of Congress and the Amendments thereof.

VII.

That under the provisions of the War Risk Insurance Act and the other Acts of Congress relating thereto, plaintiff is entitled to a payment of \$57.50 for every month since the 9th day of May, 1919, to the date of the filing of this Complaint, and there is now due the plaintiff from said date by reason of the premises, the sum of \$8855.00. [5]

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Eight Thousand Eight Hundred Fifty-Five and No/100 Dollars (\$8855.00) and such other and further payments as may now or hereafter be due and payable under the terms of the War Risk Insurance Act of October 6, 1917, and all amendatory Acts, and there be paid to plaintiff's attorneys as a reasonable attorney's fee herein 10% of the amount or amounts recovered under the judgment and paid in accordance with the provisions of the War Risk Insurance Act and all amendatory Acts, and to be deducted from such payments made to plaintiff.

SMITH, MAHAN & SMITH,
Attorneys for Plaintiff,
Helena, Montana. [6]

State of Montana,
County of Lewis and Clark.—ss.

Harry D. McCleary, being first duly sworn, deposes and says: That he is the plaintiff in the above and foregoing complaint at law; that he has read said complaint and knows the contents thereof, and that the matters and things therein stated is true of his own knowledge, except those statements made upon information and belief and as to those he believes it to be true.

HARRY D. McCLEARY.

Subscribed and sworn to before me this 25th day of April, 1932.

[Seal]

C. E. PEW,

Notary Public for the State of Montana,
Residing at Helena, Montana.

My commission expires Sept. 30, 1932.

[Endorsed]: Filed April 26, 1932. C. R. Garlow,
Clerk. [7]

Thereafter, on June 29, 1932, answer was duly filed herein, in the words and figures following, to-wit: [8]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for answer to the complaint of the plaintiff herein admits, denies and alleges:

I.

Admits the allegations of paragraph I of the complaint herein.

II.

Admits the allegations of paragraph II of the complaint herein.

III.

Admits the allegations of paragraph III of the complaint herein and in this connection alleges that the plaintiff made application for insurance in the amount of Ten Thousand Dollars (\$10,000.00) on November 16, 1917, and that premiums were deducted from his pay during his service in the army, and that said Ten Thousand Dollars (\$10,000.00) term insurance lapsed and was cancelled on the 1st day of July, 1919, for failure of the plaintiff to pay the premiums due thereon for the month of June, 1919.

IV.

Denies each and every allegation, matter and thing contained in paragraph IV of the complaint herein. [9]

V.

Admits the allegations contained in paragraph V of the complaint herein.

VI.

Admits the allegations of paragraph VI of the complaint herein and that a disagreement existed between the plaintiff and the defendant on December 1, 1931.

VII.

Denies each and every allegation, matter and thing contained in paragraph VII of the complaint herein and each and every allegation, matter and thing not heretofore specially admitted, qualified or denied.

WHEREFORE, the defendant prays judgment that the complaint of the plaintiff herein be dismissed and that the defendant have its costs.

WELLINGTON D. RANKIN,
United States District Attorney for the
District of Montana,

By D. L. EGNEW,
Assistant United States Attorney,
D. D. EVANS, Insurance Atty.,
(Attorneys for the Defendant). [10]

State of Montana,
County of Lewis and Clark.—ss.

D. L. Egnew, being first duly sworn, deposes and says that he is the Assistant United States Attorney in and for the District of Montana and one of the attorneys for the defendant named in the foregoing answer, and as such is acquainted with the facts in the case; that he has read the answer and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

D. L. EGNEW,
Assistant United States Attorney.

Subscribed and sworn to before me this 25th day of June, 1932, at Helena, Montana.

[Seal]

MARJORIE McLEOD,

Notary Public.

Notary Public for the State of Montana.
Residing at Helena, Montana.

My commission expires March 31st, 1934.

[Endorsed]: Filed June 29, 1932. C. R. Garlow,
Clerk. [11]

Thereafter, on Oct. 6, 1932, the verdict of the jury was duly rendered and filed herein, in the words and figures following, to-wit: [12]

[Title of Court and Cause.]

VERDICT.

We, the jury, in the above entitled cause find for the defendant and against the plaintiff on all of the issues.

T. U. GIBSON,
Foreman.

[Endorsed]: Filed Oct. 6, 1932. C. R. Garlow,
Clerk. [13]

Thereafter, on December 3, 1932, judgment was duly entered herein, in the words and figures following, to-wit: [14]

In the District Court of the United States for the
District of Montana, Missoula Division.

No. 1557

HARRY D. McCLEARY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

This cause came on regularly to be heard this 6th day of October, 1932, before George M. Bourquin, Judge, sitting with a jury, the plaintiff being represented by John W. Mahan, W. E. Moore and Howard Toole, his counsel, and defendant being represented by D. L. Egnew, Assistant United

States Attorney, and D. D. Evans, Chief Attorney, Veterans Administration. Whereupon a jury was duly impaneled to try the cause and witnesses were called, sworn and testified on behalf of plaintiff and said plaintiff rested his cause; thereupon witnesses were called, sworn and testified on behalf of defendant and said defendant rested its cause.

Thereupon defendant made a motion for a directed verdict upon the ground that the evidence was insufficient to support a verdict in behalf of plaintiff, which said motion after argument by counsel for the respective parties was granted by the court and thereupon a verdict, signed by the foreman, finding for the defendant and against the plaintiff on all the issues, was returned herein as directed by the Court.

Whereupon, upon consideration thereof and by virtue of the law and premises aforesaid,

IT IS CONSIDERED AND ADJUDGED, that plaintiff take nothing by this action. [15]

It is further considered and adjudged that the defendant, the United States of America, do have and recover of and from the plaintiff its costs and disbursements herein expended, taxed in the sum of \$30.00.

Entered this 3rd day of December, 1932.

C. R. GARLOW,
Clerk, U. S. District Court,
District of Montana,
By G. DEAN KRANICH,
Deputy. [16]

Thereafter, on December 31, 1932, bill of exceptions was duly settled, allowed and filed herein, in the words and figures following, to-wit: [17]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That the above entitled action came regularly on for trial in the above entitled court at Missoula, Montana, on Thursday, the sixth day of October, 1932, before the Honorable George M. Bourquin, Judge, and a jury duly and regularly impaneled and sworn to try the same, upon the pleadings theretofore filed in said action. The plaintiff was present in court and represented by counsel, John W. Mahan, of the firm of Smith, Mahan and Smith, of Helena, Montana, and by Howard Toole and W. E. Moore, both of Missoula, Montana. Defendant was represented by D. D. Evans, Chief Attorney for the United States Veterans' Administration, Fort Harrison, Montana, and by D. L. Egnew, Assistant United States Attorney of Helena, Montana.

Thereupon the following proceedings were had and taken and the following evidence was introduced, and none other:

The case was called for trial. A jury was drawn, selected and sworn to try the case. Opening statement on behalf of plaintiff was made by Mr. Mahan. Opening statement on behalf of the defendant was made by Mr. Evans.

Thereupon the following evidence was introduced by plaintiff [20] upon his case in chief:

HARRY D. McCLEARY,

the plaintiff, was called as a witness in his own behalf and having been first duly sworn testified as follows:

Direct Examination
by Mr. Mahan.

By the WITNESS.—My name is Harry D. McCleary. I am the plaintiff in the case of Harry D. McCleary against The United States of America. I have resided in Montana for approximately two years and am now living with my father-in-law, W. E. Moore, at 302 East Sixth Street, Missoula, Montana. I was in the army, having enlisted on the 29th day of March, 1917, at Miles City, Montana, in the Infantry, and I was in service twenty-three months, being discharged on the ninth day of May, 1919. I made application for and was granted war risk insurance in the amount of Ten Thousand Dollars, the premiums on which were paid from I think about December, 1917, up until the date of my discharge, the ninth day of May, 1919.

I was gassed in the Argonne on the 26th of October, 1918; I inhaled gas and it made me very sick at the time. I also had influenza while in the army, which I contracted after I was taken to the hospital from the Argonne. I was in the base hospital at Nance, France, and as I remember it was a patient there between four and five months. At that time I was under weight, had night sweats which were severe and I run a temperature all the time. I was discharged from the army at Fort

(Testimony of Harry D. McCleary.)

D. A. Russell, Wyoming, and I then went directly home, at Twin Falls, Idaho, where I made my home with my mother and father. I got to Twin Falls I believe on the 11th of May, 1919. After that I didn't [21] do anything, I wasn't in any condition to do anything. During the time that I didn't work or try to work I was at home from the date of my discharge, about a year at that time, and I was sick all of that time and not able to do anything. I felt weak and didn't have any energy to do anything. My joints bothered me, I had a cough and chest pains, coughed and spit up a lot of sputum all the time. During this period I consulted a physician, Dr. Duncan Alexander, of Twin Falls, Idaho, under whose care I was, I guess, for about three or four months. I was bedfast for about three months of this time. When I got up after having been bedfast I didn't do anything. The first time I did anything or attempted to do anything after the war was when I took vocational training, which I figure was in December, 1920, in the late fall of 1920. Before entering the army I had had an eighth grade education. I had been helping my father on the ranch when I enlisted. The first thing I took in vocational training was bookkeeping and accounting at the Lynch Business College at Boise, Idaho. As I remember it I was in that institution of training for about eight or nine months. During that time my condition physically was very bad, I coughed a lot and was weak and under weight all the time and didn't have energy to do anything. I did not attend

(Testimony of Harry D. McCleary.)

school regularly because I wasn't able to, in my condition; I was sick and feverish and felt that way. I did not get along good at all in the training for my objective. I left school because the Government discontinued my training on account of my physical condition; I was training as a bookkeeper and accountant. After discontinuing my training at Boise I went home and stayed four months, during which time I did nothing, because I was sick and I did not feel like working, I was under weight, I coughed, and had night sweats and run a temperature [22] all the time. I was that way during all of this period. I next went to Spokane, after staying home, and went into training, taking up window display work, which was institutional training; this I did at the Culbertson Department Store in Spokane. That is what is called placement training. As I remember I was there about eight or nine months, during which time I had night sweats, coughed a lot, and I did not work regularly, on account of my physical condition. I left that training at Spokane after eight or nine months because I thought California might be beneficial to my condition, so I went from Spokane to California, to San Jose, where I worked for Al Harkness Sons at show card writing, off and on, as I remember, for about a year. I did not work regularly. During all of this time I had night sweats and coughed a lot, had a temperature all the time and was under weight. I quit the job after eight or nine months on account of my physical condition. After quitting

(Testimony of Harry D. McCleary.)

that place I went to San Francisco and after several months I went to work there for the Pomin Corset Company, doing the same kind of work, show card writing. I was not rehabilitated as a show card writer, but I did follow that trade. Mr. Pomin was my boss. I had a job there writing cards and doing a little display work, and the work was very light; Mr. Pomin knew of my condition; I had so much to do and I took my time about doing it all the time, and that's the way I got by with my job. It was practically the same way, in the position I had before, the work did not require all of my time; if I had been a healthy person I could have done the work that I did in about a third of the time. While working I was under weight, coughed a lot and spit up bad sputum. After leaving that job I didn't do anything for several months, I rested, because I was sick, and by [23] that I mean that I had the same symptoms that I have already related. The next job I had was with Hale Brothers, in San Francisco. I made an attempt to bring this Mr. Pomin here as a witness; he promised me that he would come here in the capacity of a witness in my behalf, but he died and of course he couldn't be here; he died two years ago, I believe, as I remember it, or I guess, rather, that it was a year ago. After I left Mr. Pomin I didn't do anything for several months, after which I got a job with Hale Brothers in San Francisco, doing show card work for a while for them, but I did not work steady, I worked off and on, because

(Testimony of Harry D. McCleary.)

I was sick, had coughs, night sweats, temperature all the time. After I left Hale Brothers I was out of work for several months and was sick at home. Several months later I went back to Hale Brothers and the manager there feeling sorry for me, I guess, gave me a lighter job in the institution, selling radios in the radio department. I followed that for about three months, I believe, and I couldn't stay with it longer because I couldn't, I had to quit working on account of my physical condition. I haven't done any work since then.

I was first advised by a physician attending me, in 1920, that I had tuberculosis. He advised me how to take care of myself; he advised me to sleep outside and not to work, but I did work because I had a wife and family to support, and I worked whenever I could and whenever I was able to. With no more work than what I have told about here I was able to get along because I had help from other sources, help from my father-in-law, Mr. W. E. Moore, and I also had help from my own family and from the Government; I get compensation from the Government. [24]

Since I left Hale Brothers the last time I have been in the hospital, in the United States Veterans' Hospital most of the time. I have been advised by examiners in the Veterans' Bureau hospital as to what my condition or disability is, the United States Government gave me a total permanent disability, for pulmonary tuberculosis. There is a way

(Testimony of Harry D. McCleary.)

a person can tell when they have that disease, and I don't have any trouble knowing I have it for I cough a lot, spit up bad sputum and blood, sometimes, and I have night sweats all the time and run a temperature in the meantime. I think my condition has altered some since I got out of the hospital and the army; my condition has steadily grown worse all the time since I was discharged from the service. Since my discharge I have not been free from temperatures; I have not been free from the pain condition in the chest. Dr. Alexander treated me for several months at Twin Falls, Idaho, in 1920, and he tapped my left lung and took fluid out of it, I don't know how much, I was too sick to know at that time. I think I spent about seventeen or eighteen months in the Veterans' Bureau hospital. I made demand for this insurance and it was refused, I made a demand, I believe, in December, 1930, and it was refused, I think, one year later.

Cross-examination

by Mr. Evans.

By the WITNESS.—The first disability I suffered while in the army was by being gassed, on the Argonne in October, 1918. Some time after this hospitalization for the gassed condition I had influenza. From the time I was gassed until my discharge I never saw active service again, I was in the hospital almost all the time, in Nance, France.

(Testimony of Harry D. McCleary.)

I was discharged at Fort D. A. Russell, Wyoming. I was examined when I was dis- [25] charged, that is, I guess I was, in a way. I do not remember Major Elmore, at Fort D. A. Russell. You might call it an examination, which was given me at Fort D. A. Russell, before I was discharged. I haven't my discharge with me. I don't remember exactly what my discharge, dated May 9, 1919, says as to my physical condition at the time I was discharged. I do not dispute that at the time of my discharge on May 9, 1919, my physical condition was "Good." I do not remember that Major Elmore, the examining surgeon who examined me at the time of my discharge, stated that I was physically and mentally sound and no percent disabled. I don't recollect that I got a surgeon's certificate of disability when I was discharged. I was not discharged for physical reasons. I have not made any effort or endeavor, either myself or through counsel, to get the army records of my being gassed or of my being hospitalized. I haven't, I guess, any proof to offer as to my physical condition at the time of my discharge, except my own word that I am not feeling good, due to this gassing. At the time of my discharge I don't believe I made any complaint as to my physical condition or of the results of this gassing, in my claim, in fact I was anxious to get home and get out of the service, the same as all the other boys were. I made no claim of disability at that time. I guess I didn't, at that time, claim I was

(Testimony of Harry D. McCleary.)

totally disabled from either gas, influenza or tuberculosis.

Immediately after I was discharged I went to Twin Falls, Idaho, where my father lived. I didn't do anything at that time only stay home with my family. After my illness, when I was taken care of by Dr. Alexander, I made a claim to the United States Government. As to my stating in that claim, made, it is said, on the 18th of June, 1920, that from the time of my discharge from the army, in answering the questions [26] concerning my occupation since discharge, and the dates, I stated that I was farming from May, 1919, to July, 1919, at \$75.00 per month, and that I worked at the carpenter trade in July, 1919, for two weeks, and asked what I have to say as to that employment, well, in farming, my father had a little five-acre tract in Twin Falls, and I guess that's what I meant by farming. What work I done I worked for my father, but I did not receive \$75.00 per month. As to that statement made under oath being in error when I said that I received \$75.00 per month, well I don't remember of making any \$75.00 a month. If there was any work that I did do between May, 1919, and May, 1920, it was around my father's little five-acre tract in Twin Falls. I was not married at that time. I married in 1923, which was after my training period. I was with Al Harkness Sons in San Jose at the time of my marriage. At the time I was married I got help

(Testimony of Harry D. McCleary.)

from my parents several times; they were in Twin Falls, Idaho. At the time I was married I was receiving \$35.00 a week or somewhere around there, in wages, \$30.00 or \$35.00 a week, as I remember it, at San Jose. I believe I had been working for two, or two or three months, as I remember it, for these people at San Jose, before I was married, at the figures stated. I was receiving very little compensation or support from the Government, as I remember it, at the time of my marriage, I believe \$10.00 a month. Asked what led me to believe that I could be married and support a wife and family, if I was totally disabled and unable to follow any gainful occupation at that time, and why I believed that I could not only support myself but also support a wife, well at that time I hoped that possibly some day I might be better, I had hopes of getting better. [27]

I believe I started in this training the late fall of 1920. I received \$100.00 a month from the Government. I took several months bookkeeping and accounting work and there was so much inside work to it that I wasn't feeling so good, and I had a chance to take up sign painting, and after I was there some time I took sign painting with the Hopffgarten Sign and Advertising Company for a very short period of time. As I remember it I had that training for about nine months. As I remember it I started in training again about three or four months later and continued for approximately

(Testimony of Harry D. McCleary.)

nine months or a year, in Spokane. I quit training because I wanted to go to California, I thought the climate there would be beneficial to my condition. I quit at the same time one Matt Egan quit; he was in training also. Egan and I were together for a period of considerable time, that is, sort of together. I next made contact with the United States Veterans' Bureau or its agents, shortly after I went to California, I don't remember exactly how soon after but I imagine two or three or four months, along in there somewhere. If the record shows that I discontinued training about January 24, 1923, and next contacted the United States Veterans' Bureau in 1924, a year and several months later, I will not dispute that record. During the time I was in training asked if I had frequent visits from nurses who checked up on my physical condition, I will say that I do not remember any visits by any nurse when I was in training, and I will say that I did not, to my recollection, have such visits. I did, however, have treatment by doctors of the United States Veterans' Bureau for current illnesses such as colds, and so forth. I don't remember exactly how often I reported or how much time I lost by reason of colds or slight or greater illnesses during that period, but I did lose quite [28] a bit of time on account of my condition. Asked why I didn't report to the United States Veterans' Bureau if my physical condition was such as to render me totally disabled, or why I didn't report

(Testimony of Harry D. McCleary.)

to the Government during that period of one year, in 1923, when I was in San Jose, California, well I didn't figure it would do me any good if I did. I knew that I was entitled to treatment in a hospital any time I needed it. As to my not so reporting from January, 1923, until some time in 1924, well at that time I was ignorant of the fact that there were Government hospitals in existence; I didn't know of any Government hospital. I do not recollect whether I was examined in 1924 by Dr. Seid, of San Francisco, California; I do not remember Dr. Seid. Asked if I appeared before an appeal board in San Francisco, making claim for compensation on account of my physical condition, over a period from 1923 until the time when I made this claim in 1924, I believe that I did, yes. I do not remember whether at that time I made any claim for compensation on account of pulmonary tuberculosis. As to whether I was asked to submit evidence or affidavits concerning my physical condition and whether I did so or not, my answer is that I do not remember ever being asked to. I don't remember whether I made a claim for pulmonary tuberculosis at that time. I don't remember whether I made a claim for pulmonary tuberculosis, to the United States Government in November of 1924, when I was before the appeal board. I don't remember whether I was examined by Dr. Seid. I wouldn't dispute it that Dr. Seid, an official of the United States Government, examined me in Novem-

(Testimony of Harry D. McCleary.)

ber of 1924, or thereabouts. From 1925 or 1926 I did again receive compensation. I failed in my appeal to get the compensation for disability covering the period from January, 1923, [29] until 1924, when I was examined. Asked how much compensation I received and what percent disability I was rated as entitled to compensation for on account of all of my disabilities from 1925 until some later date, my answer is that I got \$50.00 a month. In 1920 was the first time I was found to be totally disabled from pulmonary tuberculosis, by the United States Government. Last year at Fort Harrison, Montana, was the first time I was found by the United States Government to be permanently and totally disabled; that was in 1931 when I received that rating.

Redirect Examination

by Mr. Mahan.

The WITNESS.—As to my having said I was examined in a way when I was discharged from the army, well I was; they had so many to discharge and I was run through a line with one doctor here and one there, and they tapped me on the chest and on the knees and that was the end of it and that was all the examination I had, which I imagine consumed maybe two minutes for the entire examination. I don't know whether or not they were giving any surgeon's certificates for disability discharge at that time.

(Testimony of Harry D. McCleary.)

Q. Were you returned to duty before you were discharged?

A. No, sir, I wasn't.

Mr. EVANS.—Objected to,—well I move that it be stricken as not the best evidence.

The COURT.—Oh, I think it is. Motion denied.

As to my having told Mr. Evans that I depended entirely on my own testimony in regard to my condition from the date of my discharge, well my family saw me at that time. I saw my mother soon after my discharge, two days after, in fact, and she [30] is here in the court room. There isn't any physician here in the court room who attended me soon after my discharge, Dr. Duncan Alexander isn't here in the court room but his testimony is here in the form of a deposition. The first time I was rated by the Bureau as totally disabled was in 1920; it wasn't determined to be permanent but was on a temporarily total basis. Some time in 1931 they decided it was permanent.

After I was discharged I first went to the government hospital in 1930. I didn't go before because I didn't know there were any Government hospitals. The first time I was given a physical examination by the government, in which sputum tests were made and x-rays taken and observation made was in 1920, by the United States Government doctors. I believe the doctor's name was Swartz, at Pocatello, and Dr. Hal Bieler, Twin Falls, Idaho. Dr. Bieler is the first government doctor I con-

(Testimony of Harry D. McCleary.)

tacted in regard to this case. I have made an attempt to get in contact with those doctors. I was unable to find Dr. Bieler, I don't know what became of him. I don't know whether Dr. Swartz is still in Pocatello or not. I do not mean to say Dr. Swartz, but rather, Dr. Sprague, that is my error. After 1920, and after those two diagnoses were made by those two Government doctors, the next time I was under observation of Government doctors where sputum tests were made, x-rays taken and continued observation made was in 1930. And none of those tests were made of me in any of these examinations referred to by Mr. Evans. The examinations made of me while I was in training consisted of questioning and maybe sounding or with a stethoscope; I don't remember whether they even used a stethoscope on my chest or not.

I have seen this application, form 526, before. This is my signature. As to it being filled out on a typewriter, well [31] I did not do that, nor do I recollect who did fill it out. As to this being signed by Henry J. Wall as a Notary Public, and asked whether I signed it in his presence, well I do not remember the man. As to it being written out here on a typewriter that I farmed from May, 1919, to July, 1919, two or three months in 1919 at \$75.00 a month, I will say that I don't remember ever getting \$75.00 a month for farming. At that time I was home in Twin Falls, Idaho, living with my father. As to this carpenter work for two

(Testimony of Harry D. McCleary.)

weeks, well if I done any carpenter work it was around the home there. I was at Twin Falls, Idaho, when this application was made out. I do not recollect Mr. Wall.

As to my reasons for getting married, other than that I thought at the time I might get better, well, like any other man, I loved my wife, I guess, loved the girl, and I wanted to marry her.

Witness Excused.

JOSEPHINE McCLEARY

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination
by Mr. Mahan.

By the WITNESS.—My name is Josephine McCleary. I am the wife of Harry D. McCleary, the plaintiff in this case. I was married on July 12, 1923. I had met Mr. McCleary in Spokane the year before I married him. I lived in Spokane at the time. Asked if I ever observed anything about his condition, before I married him, which would indicate anything not exactly normal, well I knew that he had been gassed; he told me that. I knew that he was there taking training. And I noticed that he coughed almost constantly. After we were married we went to [32] San Jose, California, about

(Testimony of Josephine McCleary.)

a week after we were married. After we were married I noticed an indication that his health was not good. I think the second week after we were married he was to work, and I noticed that he coughed almost constantly and especially at night, and he was exhausted and he just didn't seem natural or normal to me, he just didn't seem well; it seemed like he would get feverish and irritable. I have been with him part of the time during the past two years and I am living with him now. He has that constant cough now and brings up a lot of sputum sometimes. I noticed the same symptoms right away after we were married. I was living with him when he was writing those cards down there in the windows in San Jose. He wasn't well at all during that period that he worked there; I might say that pretty nearly all of the time he wasn't well; I observed that he coughed so much at nights; then he didn't get his breath and often he wasn't able to go to work. I also observed the indications of night sweats that he testified to. I observed those first very shortly after we were married, in fact right after we were married. After we left San Jose we went to San Francisco. I was with him when he was working there. His condition was just the same then, he seemed to me to be growing steadily worse. When he was at rest he seemed to be better than when he was working. As to his condition being different when he was working from what it was when he was not work-

(Testimony of Josephine McCleary.)

ing, well I think he was running a temperature most of the time and he seemed to be driving himself in everything that he did. He has not been well or normal, like any other man, since we have been married. I have a family of two children, and reside here.

Cross-examination

by Mr. Evans.

[33]

The WITNESS.—I first met Mr. McCleary in 1922, in Spokane. I was married in July, 1923. Shortly after that we returned to San Jose to live. During that time my husband was occupied in doing show card writing. He stayed there in employment in San Jose after we were married, until the following April, which would be April of 1924. During that period he received in salary or wages \$30.00 a week. Asked how much time he lost from that employment and how much money was deducted from his wages during that ten months, why he lost a great deal of time, he was off from work a lot and part of the time in bed, I couldn't say just the exact amount but he was deducted every time he was out, of course. I can't say definitely the exact amount he was deducted, I know that he missed lots of work and when he didn't work he wasn't paid for it. I have had much difficulty in meeting the family budget by reason of loss of wages. In San Francisco he worked for the William C. Pomin Corset Company. That employment, however, didn't be-

(Testimony of Josephine McCleary.)

gin immediately afterwards, in April of 1924, he didn't go to work then but I worked during that time until he went to work. After we went first to San Francisco he didn't go to work right away, but started within a couple of months, I think. I should think we might understand that he started to work there in the summer, in June or July of 1924, in San Francisco, working for the Pomin Corset Company, doing the same thing, show card writing and display work. His salary I think was about the same, \$30.00. He continued in the employment of the Pomin Corset Company for over three years. The nature of his work was the same, display work and show card writing. He lost a great deal of time at that employment, he was home in bed; I would say that he really didn't work what you might say a whole day; Mr. Pomin was very kind to us and he helped to make his [34] work easy. I can't say definitely how much time he lost. While we were in San Jose Mr. McCleary consulted physicians and doctors; I couldn't, however, remember who they were, I couldn't remember the doctors' names. I couldn't say whether there was a Dr. Bullock there; I don't remember such a person. I do not remember the names of any doctors with whom he treated in San Jose, I was new there. In San Francisco, however, I remember the names of the doctors; there was Dr. Riley and Dr. Newton. Asked what he was treated for by these doctors, well he had had pleursy badly and wasn't

(Testimony of Josephine McCleary.)

able to work, and he was run down. Asked when, if ever, I was advised by any doctor that my husband was suffering from active pulmonary tuberculosis, well I knew that he had been gassed, before I was married, and I knew that he was getting compensation and taking his vocational training. I know that active pulmonary tuberculosis is communicable and that it is dangerous to persons living in the same household with a person and that it is the custom of doctors to advise the family of that condition. Asked, again, when I was first advised of the dangerous condition of my husband from that disease, my answer is that I never talked to one of my husband's doctors myself, until these last two years. The nurse from the Veterans' Hospital in San Francisco, or the Veterans' Bureau, rather, was the first person to advise me of that.

Redirect Examination

by Mr. Mahan.

The WITNESS.—That was in October, 1930. Prior to that I had never talked to any of Mr. McCleary's physicians or to any doctor who had been treating him, nor to any nurse; that was the first time. When he got the compensation, \$50.00, is the time when I first knew he had tuberculosis; that, I think, was [35] in 1927.

Witness Excused.

Mr. MAHAN.—If the court please, we have a deposition at this time, taken by stipulation, and we desire to read it.

The COURT.—Proceed.

Mr. TOOLE.—Now this is the deposition of Duncan L. Alexander, a Doctor at Twin Falls, Idaho.

Thereupon was read into the record the deposition of

DR. DUNCAN L. ALEXANDER,

taken in accordance with stipulation at Twin Falls, Idaho, before J. R. Keenan, Notary Public, on October 4, 1932, and the testimony of said witness so given on behalf of the plaintiff is as follows:

Direct Examination

by Mr. Mahan.

By the WITNESS.—My name is Duncan L. Alexander. I reside at Twin Falls, Idaho. I am a physician and surgeon, a graduate of Michigan, a recognized medical school, in June of 1903. I am and have been since April, 1910, licensed to practice medicine in Idaho. I am now practicing at Twin Falls, Idaho, and have been since July, 1910. I have had the plaintiff, Harry D. McCleary, under my professional care. The first record that I have of examining him was on May 16, 1920. Following that date he was under my care until July 19, 1920, which is the last record that I have. I am testifying from records of my office during this time. The day book record was made daily by myself, the

(Testimony of Dr. Duncan L. Alexander.)

ledger record by my bookkeeper under my direction and supervision. I have had the custody of these records since [36] then. During the period of this treatment of plaintiff in 1920, or observation, I made the day book record myself. I am now testifying from the ledger. The day book for May, June and July of 1920 I now have in my hand. The record from which I am now testifying is in the day book, a record kept in my own handwriting. A part of this is from memory and a part is from the records, but when I first examined Mr. McCleary in May, 1920, I found him suffering from a cough, purulent expectoration, temperature continued. I did not find any other symptoms at that particular date, but within four days the patient was bedridden, that is, from May 22, 1920, up to and including June 12, 1920. I visited the patient during that time, examined several specimens of sputum, myself, and had two sputums examined by the laboratory, at Dr. Hal Bieler's laboratory, the sputum in all cases being negative for tubercular organisms, but continued staphylococci and streptococci. During this same period, May 25, a Widal agglutination blood test was done by the same laboratory to determine whether or not there was a typhoid fever present. This examination returned negative. Those sputum examinations were made on May 18th and May 25th, by the laboratory. Others I did myself, several that I remember of. On June 2nd aspiration, or puncture

(Testimony of Dr. Duncan L. Alexander.)

of the plural cavity was made and a large amount of clear yellow fluid withdrawn. I am unable to state which lung was punctured because I have no record. I further examined the patient on the third day of July; the name here is in the book-keeper's handwriting, but the notation is mine. The symptoms were fever, continued cough with expectoration purulent, repeated examination of which showed negative for tubercular organisms. There was pain in the chest and difficulty with respiration, that is, with the [37] breathing, during the acute attack. A dullness in one of the lungs developed about the first of June, 1920, and on the second of June aspirated the plural cavity, without record as to which side, and obtained a clear yellow fluid. I have a record of the clear yellow fluid. At that time my diagnosis of his condition, clinically and not from bacteriological findings, was a tubercular infection, which in my judgment was the thing that was prevalent. Asked if I would classify that as active pulmonary tuberculosis, well it was certainly very active, diseased condition at that time, but my diagnosis was clinical and not with bacteriological evidence.

Q. How long, in your judgment, had the plaintiff been infected with this disease?

Mr. QUIGLEY.—That is objected to as leading and suggestive. There is no proper foundation or showing made that the Doctor has any opportunity to base an opinion in answer to this question, on

(Testimony of Dr. Duncan L. Alexander.)

the previous lung condition, if such was found. It is incompetent, and for that reason is hearsay, not the best evidence.

The COURT.—He may answer. Overruled.

Mr. EVANS.—May we note an exception to the ruling?

The COURT.—It may be noted.

Exception Noted.

A. It is impossible for me to state.

Asked if my judgment is that Mr. McCleary during the period from May to July, 1920, while I had him under my observation, was suffering from some acute condition, my answer is that it was evidently acute because of the fact of temperature, the development of pain in the chest and the presence of fluid, [38] as demonstrated by aspiration.

Q. If it were testified to that the symptoms of temperature, cough, expectoration, had persisted in the plaintiff for a year or more prior to the time you first saw him, would it be reasonable to believe the same to be true?

Mr. QUIGLEY.—Just a moment. Objected to as calling for an opinion or conclusion of the witness upon which he has no physical facts or findings upon which to base an answer. For the further reason that it is leading and suggestive, incompetent, and for that reason would be hearsay. And for the further reason that it assumes a fact not in evidence and is a self serving declaration.

(Testimony of Dr. Duncan L. Alexander.)

The COURT.—I think that we will sustain the objection to that.

Mr. MAHAN.—Note an exception.

Exception Noted.

My records show that I have not made an examination since July 19, 1920. I know nothing about his physical condition since that date. In my judgment Mr. McCleary could not work or follow any avocation during the period I had him under my observation. I have no record of a prognosis in his case.

Cross-examination
by Mr. Quigley.

The Witness. I have testified the man was bed-ridden from May 22nd to June 12th, both dates inclusive, of 1920. I saw him again and for the last time on the 19th of July, 1920. He had gotten up from his bed during that interval, June 12th to July 19, 1920. The last time I saw him he came to my office. I don't know that I discharged him from under my care, the last [39] time he came to the office, but he was feeling improved. I may have seen him after that but that is the last time of which I have a record. All the sputum tests I made were negative for tuberculosis. Dr. Bieler, a practicing physician and surgeon at Twin Falls during 1920, made some sputum examinations for me. According to the reports those sputum ex-

(Testimony of Dr. Duncan L. Alexander.)

aminations, made at my request, and of this plaintiff, were negative, for tubercular organisms. I did not take any x-ray pictures of this plaintiff. In making the diagnosis I took into consideration the history that he gave me. In testifying just now, and in giving my diagnosis, asked if I took into consideration any of the history which the veteran gave me at that time, my answer is that I have no record, that part of the record I am unable to find, but in giving this diagnosis that I have just given I must have taken into consideration the history that he gave me at the time. All the symptoms I found existing at the time I had Mr. McCleary under observation were fever and a continued cough with expectoration, difficulty in breathing, continued temperature, pain in the chest, with dullness in one of the lungs. That pain in the chest was partially a pleurisy pain. The other symptoms that I have given might be symptoms that would be found in asthma or bronchitis. I want the court and jury to understand that the diagnosis I have given was made simply from clinical findings. The bacteriological findings are negative, in so far as my records show, that is, so far as tuberculosis is concerned. To the best of my remembrance I have not seen the plaintiff, professionally, since July, 1920. The test for typhoid fever which I referred to was negative. Asked if some of these symptoms that I have testified to might not have been symptoms that indicated to me that the veteran's lung

(Testimony of Dr. Duncan L. Alexander.)

condition might [40] have been caused from typhoid infection, well I had the typhoid fever agglutination test done because of the fact that typhoid fever sometimes begins with a bronchitis and a continued bronchitis cough and expectoration accompanied continuously by fever or a temperature higher than normal over a considerable period of time. While Mr. McCleary was under my care, if I remember correctly, the fever decreased after the aspiration of the pleural cavity. As to this whole business being very hazy, my answer is that I have a very good memory and remember things pretty well. I do not know whether Mr. McCleary went to work after he left my care.

Redirect Examination

by Mr. Mahan.

The WITNESS.—It is a practice in the profession of medicine to base a diagnosis partially on the history given by the patient; sometimes the history is of the utmost importance, in fact more important than the clinical findings. Negative sputum for tuberculosis bacilli does not necessarily mean that the patient does not have active tuberculosis. In my judgment the symptoms which I related ordinarily are found in active tuberculosis cases. Asked if asthma is one of the symptoms of tuberculosis, well, asthma is a symptom of some other existing condition. Bronchitis is the result at times of a mechanical condition in and around the bronchi

(Testimony of Dr. Duncan L. Alexander.)

that produces sufficient irritation to produce or result in cough or cough and expectoration. It is sometimes obvious in tuberculosis cases.

Recross Examination

by Mr. Quigley.

The WITNESS.—It is rather difficult for me to say whether or not most every man who smokes has bronchitis in a mild degree; [41] he may have some irritation of the bronchi which will produce a cough. I found rales in this man; they were over the apices, in fact they were general over the chest, as I remember it, but not from the record. I would not want to give any prognosis in this case.

(The deposition was duly signed and verified.)

End of Deposition.

MRS. E. M. McCLEARY

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

by Mr. Mahan.

By the WITNESS.—My name is Mrs. E. M. McCleary. At present I reside in Los Angeles, California. The plaintiff in this case, Harry D. McCleary, is my son. He was born in 1897. I was around where he was at the time he enlisted in the

(Testimony of Mrs. E. M. McCleary.)

army. After his return from the army I saw him at home, in Twin Falls, Idaho; that was on Mothers' Day, in May, 1919. I certainly noticed a difference in his appearance than when I last saw him before he went away. He went away a perfect specimen of young manhood and came back a perfect wreck; he was sick, poor and emaciated, coughing, and could hardly walk. After he was discharged he stayed home until the fall of 1920; that would be from May, 1919, to the fall of 1920. He did very little during that period of time, we didn't want him to work, for he wasn't able to work. He didn't have any pep and he had pains in his chest and he was very sick in the spring of 1920. I took care of him when Dr. Alexander was treating him. I would say that he was bedfast for two months at that time, although I just don't remember. Besides Dr. Alexander we had Dr. Bieler, Dr. [42] Hal Bieler. One of these doctors advised me as to what he might be suffering from; Dr. Alexander told me that his sickness had been caused from gas and he was afraid of tuberculosis. After the war he first left home in the fall of 1920. After he left he was in Boise, Idaho, and he came home once in a while, when he would get to feeling so bad he would come home and rest for a while. I have not lived in the same house with him for a period of time since 1920. I couldn't tell you how often I have seen him since that time. Asked if I have noticed any change in his condition now from what

(Testimony of Mrs. E. M. McCleary.)

it was when he first got out of the army, well, in appearance he has improved; he is improved now over what he was when he first came home. Asked if the symptoms are as noticeable now or whether there is any difference, well I don't know very much about tuberculosis, we have never had it in our family, with any of our folks; they tell me that he is bad off with it. I have observed just his coughing and spitting blood and sputum and being down and out. He has been that way to a large degree every time I have seen him since the war.

No Cross-examination.

Witness Excused.

DR. G. D. WALLER

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

by Mr. Mahan.

By the WITNESS.—My name is G. D. Waller. I reside in Helena, Montana, and am a physician and surgeon, a graduate of Vanderbilt Medical School.

Mr. EVANS.—We admit the Doctor's qualifications as a [43] physician and surgeon.

I am employed now by the United States Veterans' Administration, at Fort Harrison, Montana. I know the plaintiff in this case. I have charge

(Testimony of Dr. G. D. Waller.)

of the wards, as physician. I know Harry D. McCleary. I made a physical examination of him I think it was in March, 1932. That examination was made in conjunction or consultation with the board of three, of which I am a member. This is my signature to what is a part of the clinical record. It is a part of a physical examination report in which examination I participated as a physician.

Mr. MAHAN.—Is there any objection to the Doctor testifying from that?

Mr. EVANS.—Well it is a part of the official records of the United States Veterans' Bureau and is admissible as such, but we do not want to introduce the whole thing in evidence. The Doctor can testify to such part as he is familiar with. No objection.

The report of the examination made by me is dated March 18, 1932. Using this report to refresh my memory, we found Mr. McCleary to be suffering from a far advanced active tuberculosis and a chronic pleurisy of both lungs. Asked to what degree of disability with reference to whether it is total or less than total we found existed, my answer is total. Asked what my judgment is as to the prognosis, with reference to its permanency, the chances are that it is permanent. In my judgment I would say that should continue throughout the remainder of his lifetime. I heard the testimony of all of the witnesses here in this case.

(Testimony of Dr. G. D. Waller.)

Q. Considering their testimony to be correct, what in your [44] judgment would be the nature of his condition since his discharge with reference to activity?

Mr. EVANS.—Objected to for the reason that there is no proper foundation laid for such an opinion and that it calls for a conclusion upon facts which are not within the knowledge or possession of this witness.

The COURT.—Sustained.

Mr. MAHAN.—Exception.

Exception noted.

It is not necessary that a sputum test be positive for tubercular bacilli in order to establish active pulmonary tuberculosis.

Q. Dr. Alexander testified there was pain in the chest and difficulty in respiration and dullness in one of the lungs and fever, continued fever, and he aspirated the pleural cavity and obtained a clear yellow fluid. He made a test for the presence of typhoid fever and a diagnosis of active tuberculosis. What is your judgment with reference to a diagnosis on that clinical finding?

The COURT.—You mean to ask what Dr. Waller's diagnosis would be on such findings? Is that your question?

Mr. MAHAN.—Yes, whether he agrees with it.

Mr. EVANS.—No objection.

(Testimony of Dr. G. D. Waller.)

A. The diagnosis would be doubtful, to a certain extent, but pleurisy with effusion, the vast majority of cases are tubercular.

A cardiac condition might also cause or produce that purulent clear yellow fluid which was taken from the lung; practically nothing else would, that I know of; as to whether either tuberculosis or heart trouble, heart disease, would do so, I would say [45] in the vast majority of the two, a tuberculosis would. With reference to my examination I found no other condition in this patient than tuberculosis. As to finding a cardiac affliction, well I found chronic pleurisy, which very often goes with tuberculosis. I found no heart disease.

It is possible, with active pulmonary tuberculosis, for a man to work; from a medical standpoint it is not advisable, for it would be detrimental to the patient's health; this would be true because exhaustion and worry are two of the worst things that can happen to a tuberculosis patient. Asked if a man is or is not imperiling his life by working, with active pulmonary tuberculosis, well it could not help him.

Cross-examination

by Mr. Evans.

By the WITNESS.—A great many men, by proper care and proper sanitation, work over long periods of years with active tuberculosis. In certain stages active tuberculosis is curable. There are

(Testimony of Dr. G. D. Waller.)

records of a great many cases where a man has been active for a short period of time, recover, and may carry on with his regular occupation for several years and then later have a breakdown from that disease. I do not think that this condition of the lung, found in McCleary by Dr. Alexander in 1920, could have been a pneumonia. Asked what the presence of staphylococci and streptococci, with no tubercular bacilli, would indicate to me as to the nature of that disease suffered by McCleary in 1920, I will ask where the staphylococci were found; being told that two sputums examined in Dr. Hal Bieler's laboratory, and the sputum in all cases being negative for tubercular organisms but contained staphylococci and streptococci, from the sputum, I will say that it wouldn't mean much of any- [46] thing. It wouldn't mean that he had tuberculosis and it wouldn't mean that he did not have it. As to the absence of tubercular bacilli indicating that he did not have tuberculosis, if I may answer it in this way: the presence of tubercular bacilli in the sputum is one of the positive proofs of an active tuberculosis, but the absence of it does not mean that he does not have it. Having heard the testimony of Dr. Alexander read, in the deposition, and asked if there is any positive proof in that deposition that McCleary had tuberculosis, either active or arrested, in 1920, my answer is that there are very few cases of pleurisy with effusion that are not tubercular. As to the most I would say

(Testimony of Dr. G. D. Waller.)

being that it is possible that he had tuberculosis in 1920, I would say, it is probable.

Witness Excused.

DR. JAMES D. HOBSON

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination
by Mr. Mahan.

By the WITNESS.—My name is James D. Hobson. I reside in Missoula, and am a physician by profession, and a graduate of a recognized medical school.

Mr. EVANS.—We will admit Dr. Hobson's qualifications as a physician.

I am connected with the Veterans' Administration, being a designated examiner. I have represented the Veterans' Bureau here, medically, since 1919. The title always has not been designated examiner. I am acquainted with Harry D. McCleary, the plaintiff in this case. I have made a physical examination of him. The first examination was made some months ago, I don't [47] know exactly when. Upon that examination he, I thought, had a fibrous tuberculosis, which was active at that time; the sputum was examined and found to be full of tubercular bacilli. Comparing them with

(Testimony of Dr. James D. Hobson.)

my experience in other sputum tests, asked how much bacilli it contained, well on the examination that I made his sputum contains more tubercular bacilli, I believe, than any case I have ever seen; they just come forth in showers, apparently. I think that his condition at present is worse than it was a few months ago. I think he is totally disabled. The chances of his recovery are problematical. I think it is reasonably certain the plaintiff will continue totally disabled the remainder of his life. I have, indeed, many times made a diagnosis of active tuberculosis on clinical findings and history alone.

Dr. Alexander's sworn deposition which was read into the record, stating that the doctor examined and had the plaintiff under his observation for a short period of time in 1920, that the symptoms were fever, and continued cough with expectoration, and purulent, which in repeated examination showed negative for tubercular organisms, pain in the chest and difficulty with respiration and with breathing, a dullness in one of the lungs, that he aspirated the pleural cavity and obtained a clear yellow fluid, and that he made a diagnosis of active pulmonary tuberculosis existing at that time; that he made a test for typhoid fever which was found to be negative; that this continued during a portion of May, June and July, 1920, that is, over a period from May 16, 1920, to July 19, 1920; that during the period from May 22nd to June 12th he was

(Testimony of Dr. James D. Hobson.)

bedfast,—asked what my diagnosis would be under those findings,—I would say that in all probability he had a tubercular pleurisy with effusion. [48] If it were established in my mind to be correct that continuously since, the plaintiff has had night sweats and temperature, cough with expectoration, and later developed positive sputum, taking into consideration the condition I found when I first examined him, I think the plaintiff has probably been continuously active since 1920.

Q. And with the history of having been gassed, and influenza with three or four months hospitalization in 1918 and 1919, what would be your judgment with reference to active, since that hospitalization?

Mr. EVANS.—Objected to as an improper foundation and too speculative and the facts stated too remote for the doctor to base an expert opinion thereon.

The COURT.—I think so. Sustained.

Q. If you were told or knew that he was gassed in October, 1918, by inhaling poisonous gasses, and later, shortly thereafter developed a severe case of influenza, was hospitalized for that over a period of three or four months, and then continued cough, fever and lack of vitality, expectoration, and entirely from the time of his hospitalization up to and including May, 1920, when Dr. Alexander was called, would it be or would it not be your judg-

(Testimony of Dr. James D. Hobson.)

ment that he was active from the time of the influenza or hospitalization?

Mr. EVANS.—Objected to for the reason that it calls for a conclusion of this witness, based on a purely speculative or probable conclusion and is too remote on which to base an expert opinion.

The COURT.—Sustained.

The symptoms of active tuberculosis are loss of weight, temperature, rise in pulse rate, weakness, general lack of [49] ambition, certain physical findings in the lungs, consisting of impaired resonance with rales, and a positive sputum, are the generalized symptoms of active tuberculosis. If the evidence shows that McCleary had all of these symptoms with the exception of the positive sputum, during any period of time, as to the probability being that he was active, I will say, considering his history of influenza and his history of pleurisy with effusion, I would consider that he has been active since that time, for the reason that a great many cases of tuberculosis follow a severe influenza with pro-bronchial involvement. It is entirely possible for one with tuberculosis to work or follow an occupation; it is so possible even with active tuberculosis. It would, however, very much endanger his life to do so, I think. It is true that some individuals, suffering from active tuberculosis, can work and carry the load of working, while others cannot.

(Testimony of Dr. James D. Hobson.)

Cross-examination

by Mr. Evans.

The WITNESS.—Asked if it is possible for a man to suffer from an attack of acute active tuberculosis, have that arrested and cured and then go on without disability for a considerable period of time, I think that the majority of cases of chronic tuberculosis show periods of a rest when they are apparently not active. No one can say how long those periods of rest will be,—an indeterminate time; it depends on the personal equation and the resistance and upon the circumstances. The condition might, indeed, become arrested and stay arrested for the balance of his lifetime, and, of course any time less, ten years or five years, when he would be handicapped little or none by such disease,—that is true. Asked if pleurisy with effusion might not come [50] from some other cause than tuberculosis, I will say that there are cases of pleuritic effusions which are not tubercular but the larger majority of them are tubercular. One may have pleurisy with effusion from an injury. Pleurisy with effusion occasionally accompanies a lobar pneumonia. In a lobar pneumonia if the chest were tapped and fluid taken from it, asked what would be the nature of such fluid, well more often than not it becomes purulent, it does not remain clear. Usually in a lobar pneumonia it is infected with pneumonococcus, and that makes a moderately thick, purulent fluid.

(Testimony of Dr. James D. Hobson.)

I heard the latter portion, only, of the testimony of Dr. Alexander. Asked if there is anything in that testimony to lead to a positive conclusion that this was a case of tuberculosis or that there was any probability of it, well there is no finding of tuberculosis that we would call a pneumonic finding, but considering the history, considering the onset and the length, the character of the fluid, one would assume that in a large majority of cases that is of tuberculosis origin. Having no other evidence on which to go except the statement that the patient had suffered from more or less the same symptoms since that time, as to my not being in a position to say that he had been active ever since that date, well he may have had periods of quiet, of course. If the Government records show that he was examined in 1922 and 1921 and 1924 and 1925 and on none of those occasions was he found to have active, asked what I would say as to the presence of active, during that period, my answer is that if the examinations were competent I should say that he must have been inactive at least at periods during these examinations. Judging, then, from such [51] testimony as I have already heard, I think that no one could state positively that the plaintiff had been active, without a period of remission, since 1920, with no other evidence to go upon.

(Testimony of Dr. James D. Hobson.)

Redirect Examination

by Mr. Mahan.

The WITNESS.—I don't recall having testified that it is my belief that the plaintiff has been continuously active since he had the influenza; I think he has had tuberculosis all the time, but he may have had periods of quiescence, which occur in a lot of cases, of course; quiescence means inactive, arrested. If anything is merely in arrest it cannot be called permanently cured, of course, according to my thought.

Q. What do you mean by competent examinations?

The COURT.—Oh, I think we all understand that.

Is active tuberculosis curable?

A. Yes, sir, in some instances, if taken early enough.

The COURT.—Air and quiet and rest?

A. And peace of mind.

The COURT.—The less work a man does the more likely he is to be cured?

A. Indeed, yes, because I consider tuberculosis as a fire that is burning; he has to use all of his resources to put it out. If he is worried or has to work hard, of course, a lot of his energy is going some place where it is misdirected, of course.

Witness excused.

Thereupon at twelve o'clock noon recess was had until one-thirty o'clock p. m., when the trial was resumed. [52]

The COURT.—You may proceed.

Mr. TOOLE.—If your Honor please, the plaintiff's case is closed. We finished before lunch.

The COURT.—Proceed with the defense.

Mr. EVANS.—If it please the Court, at this time, before the plaintiff rests or closes, in order that it may not be said that they had no evidence available, we offer access to all of the files and records of the United States Veterans' Bureau to the plaintiff, or any such part thereof as he may desire, without order of Court for that purpose.

The COURT.—Well, I have no doubt if they wanted them that they would have called for them long since, as they had that right. Proceed with your defense.

Mr. EVANS.—At this time, if it please the Court, we wish to make a motion.

The burden is on the plaintiff to prove:

1. That on or before July 1, 1919, the insured was suffering from that bodily impairment alleged in the complaint;

2. That by reason of that impairment the insured was on July 1, 1919, totally disabled, that is, that it was then impossible for him to continuously carry on a substantially gainful occupation; and

3. That the conditions totally disabling the insured on July 1, 1919, were reasonably certain to

continue throughout his life from that time with the same totally disabling effect on his [53] ability to work.

The plaintiff has failed to offer any substantial evidence whatsoever that the insured was suffering from chronic, active, pulmonary tuberculosis, and has failed to show that the inhaling of poisonous gases into his lungs on October 26, 1918, was causing any disability whatsoever on July 1, 1919, and has failed to show that the influenza suffered in November, 1918, was causing any disability whatsoever on July 1, 1919, and has failed to show that by reason of tuberculosis, gassing, nervous conditions or any other causes, that the insured was on July 1, 1919, totally disabled or even partially disabled to any extent and by his own admissions and positive evidence to the contrary has offered substantial proof that he had no impairment of mind or body which rendered it impossible for him to carry on a gainful occupation from July 1, 1919, for six months thereafter.

The plaintiff has failed to offer any substantial proof that these disabilities alleged in the complaint were reasonably certain to continue throughout his lifetime after July 1, 1919, with a totally disabling effect on his ability to work, and has offered positive proof that such total disability in fact did not exist for years when his ability to follow a gainful occupation was proved by his having followed such gainful occupation year after year. [54]

The plaintiff having failed to offer substantial evidence in support of these three requisites of proof, and assuming that all of the evidence submitted by the plaintiff is true, the defendant now respectfully moves the Court that a verdict be directed in favor of the defendant, reserving, however, the right to produce evidence on behalf of the defendant and to renew this motion at the close of all of the evidence.

It has been adjudicated that tuberculosis as such is not proof of total disability, but that each case of tuberculosis must be judged on its own merits.

By the COURT.—I think that the Court will reserve the right to proceed, with this in mind, and your motion may be renewed at the end of the defendant's case. Pro forma the motion is denied.

And thereupon the defendant introduced the following evidence in support of its case in chief:

DR. HERBERT C. WATTS

was called as a witness on behalf of the defendant and having been first duly sworn testified as follows:

Direct Examination

by Mr. Evans.

By the WITNESS.—My name is Herbert C. Watts. I am a physician by profession. I am a specialist on public health and tuberculosis. I now occupy the position of manager of the Veterans' Administration of the State of Montana, which [55] management includes the hospital. I am also head of the hospital at Fort Harrison. As such manager

(Testimony of Dr. Herbert C. Watts.)

I have in my possession and control the records of the plaintiff, McCleary, in the matter of compensation and insurance. These are all of the records of the United States, the defendant in this action, pertaining to the case of McCleary.

I heard the deposition read this morning concerning treatment by Dr. Alexander of McCleary in 1920. I have in the files the record of a physical examination made by Dr. Bieler pertaining to that particular period of illness. Exhibit 1, shown me, bearing date of June 19, 1920, and August 3, 1920, consists of examination reports submitted regularly in the course of business of a department of the United States Government, and said reports are a part of the official records of the file of the plaintiff McCleary.

Mr. EVANS.—We offer in evidence Exhibit 1.

Mr. TOOLE.—To which we object, if your Honor please, because in the first place it is hearsay, being a document under which plaintiff is deprived of the right to cross-examine. In the second place it is incomplete, it fails to show the character of the examination in full, it fails to show to what extent an examination was made for the purpose of determining this particular disability. In the third place it is incompetent because it is not a record which is kept under seal and does not bear the seal of any department of the United States Government, and in the fourth place it is not shown, does not appear from that document, as to whether or not the per-

sons who made the exami- [56] nations were qualified as physicians; there is no evidence in the record to show who they were or what kind of doctors or what qualifications they had.

The COURT.—Have you any authority to support this?

Mr. EVANS.—If it please the Court, *Long v. United States*, Circuit Court of Appeals, 4th Circuit decision June 13, 1932, upholds the admissibility of government records and particularly of examining physicians, in the long opinion which is the 59th Federal, 602. The reasoning is well taken and the objections offered by counsel are all met by that decision and they are held as admissible.

The COURT.—Let's see your case. Was there a report made like this one long after discharge or during the * * *

Mr. EVANS.—* * * They were made after discharge, if it please the Court.

Mr. TOOLE.—May I add to the objection that this particular document has not been properly identified, and the custody of it, the proper custody, has not been shown during any of this time.

The COURT.—The statutes of the United States provide for these examinations by doctors in the service of the government, and to whom the claimant or the insured soldier can have access for the purpose of examination in presenting his claims and the like for compensation or other insurance. This plaintiff testified he had been examined by this doctor, when he himself was on the stand, is

[57] my recollection, and now it is produced, the record of that examination, from amongst the records of the United States, that is to say, of the Veterans' Bureau. There are presumptions attaching to the validity of records thus produced, that they have been properly kept and are of themselves genuine. Accordingly the government is entitled to introduce this and the plaintiff would be,—I am not sure that it is of any particular prejudice to either party, as far as that goes,—and the objection will be overruled.

Mr. TOOLE.—Note an exception.

Exception noted.

And thereupon was received in evidence, over the objection, the Defendant's Exhibit 1, being in words and figures as follows to wit:

Defendant's Exhibit 1.

Report of Physical Examination.

Twin Falls, Ida.,

June 19, 1920.

1. Name Harry D. McCleary (C—pending.)
Army Serial No. 82273.
2. Rank and Organization, Pvt. 169 Inf.
3. Age 23. Nativity Iowa. Sex M. Race W.
Married..... Single, Yes. Widower..... Divorced
.....
4. Previous occupation, Farmer.
5. Present Address, Route 3.
6. Permanent Address, Twin Falls, Ida.

7. Brief military history of claimant's disability: Inducted March 29, 1917, in good health. Was at the [58] front with the Rainbow Div. for nine months, and during that time he was gassed three times but never reported to hospital for same. Had several attacks of acute tonsillitis and was partially shell shocked several times. Memories full of ghastly horrors. Gassed slightly and had the flu during the Argonne drive and was at Base 216 Nance for two months and recommended for discharge. Had tonsillectomy on boat coming home. Was never considered a lung case. No venereals.

Date of discharge May 9, 1919.

8. Present complaint: Cough, loss of weight, shortness of breath, pains in left chest at night, expectoration, pains in shoulders, arms and fingers.

9. Physical examination: A thin nervous looking boy, fairly well developed, head, neck, abdomen and genitals normal. Heart negative, blood pressure S-120, D-80. Lungs show moisture throughout and bronchial breathing at right apex, and cog wheel breathing at right base. Dullness at left base, where 30 cc. of clear yellow fluid was tapped two weeks ago. Small effusion still present. Sputum very viscid and negative for T. B., but contains many eosinophile cells and Curshman spirals. Urine, normal. Bronchial asthma 127. Pleurisy, chronic fibrous with effusion. 969. (Possibly T. B.)

10. Diagnosis.....

11. Basis for diagnosis, examination.
12. Complication, sequela, etc. General weakness.
13. Where was sickness or disability incurred? France.
14. How incurred? Gas and exposure.
15. Disposition, examined.
16. Condition on disposition, bad.
17. Prognosis, questionable. [59]
18. Is claimant able to resume former occupation? No.
19. Do you advise it? No.
20. Is claimant bedridden? Partly.
21. Is claimant able to travel? Yes.
22. Do you advise hospital care? No.
23. Will claimant accept hospital care? Yes.
24. In your opinion is disability due or traceable to service? Yes.
25. The claimant has a vocational handicap which is: Major.
26. Is his physical and mental condition such that vocational training is feasible? No.
27. Remarks: This case has been treating with a private doctor. The boy tried to work three weeks ago, and the pleural effusion followed. He has been in bed the last three weeks, and is now up, and has no fever. Seems to be gaining weight. It is dangerous for this man to try to work for some time. He can follow all necessary treatment at home.

Hal Bieler, D. E.,

Surgeon U. S. P. H. S.

REPORT OF PHYSICAL EXAMINATION.

Twin Falls, Ida.,

Aug. 3, 1920.

1. Name Harry D. McCleary. (C—435834.)
Army Serial No. 82273.
2. Rank and Organization, Pvt. 169 Inf.
3. Age 23. Nativity..... Sex..... Race W.
Married..... Single..... Widower..... Divorced
.....
4. Previous occupation, Farmer.
5. Present Address, Route 3 Twin Falls, Ida.
6. Permanent Address [60]
7. Brief military history of claimant's disability:

Inducted March 29, 1917, in good health. Was at the front with the Rainbow Div. for nine months and during that time he was gassed three times but never reported to hospital for same. Had several acute attacks of tonsillitis, and was partially shell shocked several times. Memories full of ghastly horrors. Gassed slightly and had the flu during the Argonne drive and was at Base 216 Nance for two months, and recommended for discharge. Had tonsillectomy on boat coming home. Was never considered a lung case. No venereals. In April, 1920, after trying to work, has pleurisy with effusion, left base, and was tapped twice, 30 cc. clear yellow fluid obtained at second tapping. Lost about 40 pounds at that time. Made a very slow recovery, and has gained 10 pounds of this weight back.

Date of discharge, May 9, 1919.

8. Present complaint: Slight cough, weakness, pain in the right shoulder.

9. Physical examination: A thin, nervous looking boy, fairly well developed. Head, neck, abdomen, genitals and extremities apparently normal. Heart normal, rate 100, blood pressure S-110, D-70, right lung normal. Left shows dullness at base posterior, but no signs of fluid. Probable thickened pleura. There is apparent atrophy of the left chest, which has a circumference of three cm. less than right chest. Left apex shows crepitant rales throughout, but no impaired resonance. Sputum negative for T. B. Urine, normal.

10. Diagnosis, bronchial asthma. 127. Pleurisy, chronic fib. 969. Thickened at left base.

11. Basis for diagnosis, examination and history. [61]

12. Complication, sequela, etc. None.

13. Where was sickness or disability incurred? France.

14. How incurred? Gas and exposure.

15. Disposition. Examined.

16. Condition of disposition. Weak, but improving.

17. Prognosis. Uncertain.

18. Is claimant able to resume former occupation? No.

19. Do you advise it? No.

20. Is claimant bedridden? No.

21. Is claimant able to travel? Yes.
22. Do you advise hospital care? No.
23. Will claimant accept hospital care? Yes.
24. In your opinion is disability due or traceable to service? Yes.
25. The claimant has a vocational handicap which is: Major.
26. Is his physical and mental condition such that vocational training is feasible? No.
27. Remarks: Prolonged rest, to be continued for at least 60 days.

Hal Bieler, D. E.,
Surgeon U. S. P. H. S.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—Exhibit 2, shown to me, is known colloquially as Form 526. It is the application which a person makes when he requests compensation. I heard the testimony of the plaintiff this morning, in which he admitted that this is his signature, on the document here which was then referred to; this is that same document.

Mr. EVANS.—We offer in evidence Exhibit 2.

Mr. MAHAN.—We have no objection. [62]

Thereupon was received in evidence without objection the instrument referred to, being as follows, to wit:

DEFENDANT'S EXHIBIT 2.

APPLICATION OF PERSON DISABLED IN
AND DISCHARGED FROM SERVICE.

(Here follows printed instructions—not copied.)

1. Full name, Harry D. McCleary.
2. Address, Route No. 3, Box 85, Twin Falls, Idaho.
3. Under what name did you serve? Harry D. McCleary. (a) Serial No. 82273.
4. Color, white. Date of birth, March 9, 1897. Place of birth, Winterset, Iowa.
5. Make a cross (X) after branches of service you served in: General service (X).
6. Date you last entered service, March 29, 1917. Place of entry, Miles City, Mont.
7. Rank or rating at time of discharge, private.
8. Company and regiment or organization, vessel or station in which or on which you last served: Co. Hq. 168th Inf.
- 8a. Give fully any other service in the military or naval forces, stating rank and organization. No other.
9. Date and place of last discharge. May 9, 1919, Fort D. A. Russell, Wyo.
10. Cause of discharge, Circular 106 W. D. 1918.
11. Nature and extent of disability claimed. Trouble with lungs. Has been able to work only part of time since discharge.

12. Date disability began. For the last four or five months.

13. Cause of disability. Gas, influenza and exposure.

14. When and where received. Had influenza October, 1919, Capt. W. H. Nead commanding. Gassed in April, 1918, on the Lorainne front. Gassed in October, 1918, on the Argonne front. [63]

15. Did you receive treatment at an army hospital? Yes. (a) If so, state name and location of the hospital. Base Hospital 216, Nantes, France. Also in hospital on way back to U. S. and in Naval Hospital, Charleston, S. C.

16. Occupations and wages before entering service: Farming for father and living at home.

17. Last two employers before entering service: Worked for father.

18. Occupation since discharge, dates of each, and wages received. If less than before, why? Farming May, 1919—July, 1919, \$75.00 per mo. Carpenter trade July, 1919, for two weeks.

19. Present employer: Not working.

20. Name and address of attending physician: Dr. D. Alexander and Dr. Bieler, both of Twin Falls, Idaho.

21. Are you confined to bed? Part of time. Do you require constant nursing or attendance? No.

22. Name and address of nurse or attendant? None. Sick at home.

23. Are you willing to accept medical or surgical treatment if furnished? Yes.

24. Are you single, married, widowed or divorced? Single.

25. Times married. x x

26. Date and place of last marriage. x x

27. Times present wife has been married. x x

28. Maiden name of wife. x x

29. Do you live together?

30. Have you now living a child or children, including stepchildren and adopted children, under 18 years of age and unmarried? x x

31. If so, state below full name of each child and date of [64] birth; if a stepchild or adopted child, so state and give date stepchild became a member of your household or date adopted child was adopted by you. x x

32. Have you a child of any age who is insane, idiotic or otherwise permanently helpless? x x

33. State whether your parents are living together, separated, divorced or dead. Living together.

34. Give name and address of each parent living. W. Edgar Milton McCleary, R. F. D. 3, Twin Falls, Idaho. Lorinda J. McCleary, same address.

35. Age of mother, 43. Age of father, 53.

36. (a) Is your mother now dependent on you for support? No.

(b) Is your father now dependent on your for support? No.

(c) If so, give your average monthly contribution to your mother, \$00; your father, \$00.

37. (a) Value of all property owned by your mother, \$00; your father, \$12,000.

(b) What is the monthly income of your mother, \$00; your father, \$150.00.

38. Did you make an allotment of your pay? No.

39. If so, to whom? x x

40. Give number of any other claim filed on account of this disability and place where filed. No other.

41. Did you ever apply for War Risk Insurance? Yes.

(a) When and where? Dec., 1917, Camp Mills, N. Y.

(b) Insurance certificate number. Unknown.

42. Name of beneficiary? Lorinda J. McCleary.

I make the foregoing statements as a part of my claim with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or in- [65] surance.

Harry D. McCleary.

Subscribed and sworn to before me this 18th day of June, 1920, by Harry D. McCleary, claimant, to whom the statements herein were fully made known and explained.

[Notarial Seal]

Henry J. Wall,
Notary Public.

We, the undersigned, severally solemnly swear that we have know the claimant whose name is subscribed above, six years, and that we have read the statements made by him, and the facts stated are true to the best of our knowledge and belief.

S. Ralph Klein, 130 Jefferson Ave., Twin Falls, Ida.

Andrew S. Betzer, 408 Elm St., Twin Falls, Ida.

Subscribed and sworn to before me this 18th day of June, 1920.

[Notarial Seal]

Henry J. Wall,
Notary Public.

Mr. EVANS.—Mr. Mahan, will you look over this copy of the discharge and tell me if you have any objection to that being admitted instead of the original. The original is in the possession of the plaintiff and this is merely a copy.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—Exhibit 4, handed me, and consisting of ten sheets, are records of the United States Veterans' Administration. These are medical follow-up reports executed by what is known as the follow-up nurse; they are part of the official records of the Veterans' Administration.

Mr. EVANS.—We offer Exhibit 4.

Mr. TOOLE.—We make the same objection we made to the [66] other, and in addition the objection that they appear to have been made by the follow-up nurse whose qualifications do not appear

(Testimony of Dr. Herbert C. Watts.)

at all, and they have not been properly identified as records of the government; their custody has not been shown during a period of years.

Mr. EVANS.—I might limit our offer on that, if it please the Court, only to that portion of those reports which refer to his physical condition on the date given. I think that is all that is really admissible.

The COURT.—Well, who is the one that signed here,—J. H. Hofgard, manager?

Mr. EVANS.—They are signed, both by a nurse and by a supervisor, if it please the Court. Some of them may not be signed by a nurse. I haven't examined them carefully, but we offer those that are signed by a registered nurse only. If I inadvertently included some I will withdraw them; in any event I will not use them.

Mr. TOOLE.—Well, they are further objected to for the reason that there is nothing to show the person who signed them is qualified.

The COURT.—This seems to be while he was in training at this store, advertising sign company.

Mr. EVANS.—I think possibly that first one is, but that report is originally used by nurses.

The COURT.—I don't think these are entitled to admission. The objection will be sustained to these.

Mr. EVANS.—May we have an exception? [67]

The COURT.—You may have it.

Exception noted.

(Testimony of Dr. Herbert C. Watts.)

The offer of Defendant's Exhibit 4 was by the Court denied.

Mr. EVANS.—We offer Exhibit 3, which purports to be a copy of the honorable discharge from the United States Army of Harry D. McCleary.

Mr. TOOLE.—No objection.

The COURT.—Very well.

Thereupon without objection was received in evidence the instrument referred to, identified as and marked Defendant's Exhibit 3, and as follows:

DEFENDANT'S EXHIBIT 3.

U. S. Army Recruiting Station, Twin Falls, Idaho. This is to certify that one bronze "Victory Button" has been issued. Frank C. Bird, Capt. F. A., U. S. Army.

Pay Claim No. 52854-M, filed office Director of Finance, War Dept., for settlement Dec. 23, 1919.

ENLISTMENT RECORD.

Name, Harry D. McCleary. Grade, Pvt.

Enlisted 3-31-1917 at Miles City, Mont.

Serving in first enlistment period at date of discharge.

Prior service. None.

Non-commissioned officer. Never.

Marksmanship, gunner qualification or rating. Not qualified.

Horsemanship. Not mounted.

Battles, engagements, skirmishes, expeditions: Loraine 3-13, 6-19-1918; Champagne 7-15-20-18; St. Mihiel 9-12-26-18; Argonne 10-13-26-18; C. Thiery 7-23-29-18.

Knowledge of any vocation. Farmer.

Wounds received in service. None. [68]

Physical condition when discharged. Good.

Typhoid prophylaxis completed 4-10-17.

Paratyphoid prophylaxis completed 11-8-17.

Married or single. Single.

Character. Excellent.

Remarks: Service, honest and faithful. No A. W. O. L. or absence G. O. 31 W. D. 1912 and G. O. 45 W. D. 1914.

Entitled to travel pay to Miles City, Mont.

Signature of soldier.....

C. R. Farmer,

1st Lieut. A. G. D.

Asst. Par. Adj. Commanding.

\$60.00 bonus, Section 1406 of the Revenue Act of 1918, approved February 24, 1919. Paid Fort D. A. Russell, Wyo., May 9th, 1919. Paid in full \$112.06. BASIL G. SQUIER, Major Q. M. C.

(I hereby certify that the above is a true copy, discharge of Harry S. McCleary. R. C. Letsch, Notary Public.)

HONORABLE DISCHARGE FROM THE
UNITED STATES ARMY.

TO WHOM IT MAY CONCERN:

THIS IS TO CERTIFY, That Harry D. McCleary A. S. 82273 Pvt. Headqrs. Co. 168 Inf. THE UNITED STATES ARMY, as a TESTIMONIAL OF HONEST AND FAITHFUL SERVICE, is hereby HONORABLY DISCHARGED from the military service of the UNITED STATES by reason of Circular 106 W. D. 1918.

Said Harry D. McCleary was born in Booneville in the State of Iowa.

When enlisted he was 19 years of age and by occupation a farmer.

He had brown eyes, brown hair, fair complexion, and was 6 [69] feet 0 inches in height.

Given under my hand at Fort D. A. Russell, Wyo., this 9th day of May, one thousand nine hundred and

H. C. Smith,

Commanding.

R. G. White,

Contact Officer, Dist. No. 13.

A true copy of a certified copy.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—Exhibit 5 is a part of the records of the United States Veterans' Administration, and is known as the physical examination report. This was made by Dr. C. H. Sprague, of Pocatello,

Idaho, December 10, 1921. It included a third sheet, which is a correction thereon, also signed by Dr. Sprague.

Mr. EVANS.—We offer Exhibit 5.

Mr. MAHAN.—Well, your Honor, we object to that for all of the reasons we have stated in our preceding objections; for the further reason that it is not an original record but is a typewritten copy of a record which does not appear to have been signed,—oh yes,—but we further object, and particularly object to page 3 because it contains statements of conclusions which are not based on anything in the record in this trial and is extremely prejudicial.

Mr. EVANS.—We are not offering that portion written by anyone or signed by anyone but Dr. Sprague; it is a portion of a letter, to which he replied on the same page.

Mr. MAHAN.—Well, it has all the objections that were offered, then, to the other documents. Also add the objection that it is not shown that Dr. Sprague [70] was or that he had any connection at that time with the Veterans' Bureau.

Mr. EVANS.—Dr. Sprague, if it please the Court, is the same doctor referred to by the plaintiff in his testimony this morning, as the doctor at Pocatello, Idaho, who examined him, and whom the plaintiff admitted examined him. The Court will recall that I interrupted him and changed the name at that time.

The COURT.—Who is this Dr. Sprague?

(Testimony of Dr. Herbert C. Watts.)

Mr. EVANS.—An examining * * *

The COURT. * * * Do you know?

A. Not personally, no, sir, but from the document there, he was what was known as the designated examiner at that time; you see the signature, "U. S. P. H. S.", because at that time all of the physicians were under the Public Health Service.

The COURT.—Well, under the ruling heretofore made it is admissible.

Mr. MAHAN.—You didn't offer that third page, did you?

Mr. EVANS.—Not that portion of the third page written by someone else, but that portion written by Dr. Sprague, at the bottom.

Mr. MAHAN.—Well, I think the third page should be excluded on the ground that he is only offering a part of a written exhibit; certainly the first part of it is not admissible.

The COURT.—What is the date of this one? December 10, 1921?

Mr. EVANS.—Yes, your Honor. We believe the letter to Dr. Sprague is really admissible as part of [71] that same examination, as it is a discussion of the findings of the examination and a part of the record of that examination.

The COURT.—I think if I were plaintiff's counsel I should want that to go in. You object to this third page?

Mr. MAHAN.—Well, I would like to see it. I had very little time to read it. If it has anything in

(Testimony of Dr. Herbert C. Watts.)

it that helps us, of course, we would like to have it go in. We withdraw our objection.

The COURT.—Very well, it will be admitted.

The document, Exhibit 5, was thereupon received in evidence, and is as follows:

DEFENDANT'S EXHIBIT 5.
REPORT OF PHYSICAL EXAMINATION.

(Printed instructions for filling out report not copied.)

C. No. 435,834.

Place: Pocatello, Idaho.

Date: December 10, 1921.

1. Claimant's name McCleary, Harry De Witt, S., M., W., D.

2. Service, rank, organization; date of induction and military discharge: Pvt. Co. Hq. 16th Infy. Date of discharge: May 9, 1919.

3. Present address: Twin Falls, Idaho.

4. Age, 24.

5. Color, white.

6. Principal prewar occupation, farmer.

7. Medical and industrial history since military discharge: Any acute intercurrent illnesses? Treated by what physicians? When? In what hospitals? When? Where? Employed continu- [72] ously? Where? When?

Brief military history: Enlisted March 29, 1917, at Miles City, Mont., Co. E, 2nd Mont. unit

changed to 163rd Infty., with which overseas Dec. 14, 1917; in France transferred to above unit; partook of Lorraine, Champagne, Chateau Thierry, St. Mihiel, Argonne; gassed Oct. 23, 1918, to B. H. 216, where remained about four months; had "flu" while in hospital for gas; also had tonsillitis and abscess of jaw with tonsillectomy while en route home; arrived U. S. Apr. 16, 1919, to Naval Hospital at Charleston with tonsillitis about a week; to Ft. Russell, where discharged in good physical condition; no other sickness while in service; no dental work done; no accidents, injuries nor operations.

History prior to service: Measles and whooping cough in childhood; no scarlet fever nor diphtheria; no pneumonia nor smallpox; no typhoid; no other fever; had tonsillitis about every winter; no rheumatism; no dyspnea nor edema; no continued cough nor hemoptysis; no alimentary disturbances, piles nor jaundice; no urinary disturbances nor venereal disease; no nervous nor mental trouble; had some mild "bilious headaches," which ceased in service; no trouble with eyes or special senses aside from occasional tonsillitis; no dental work done; no accidents, injuries nor operations; no trouble with bones, joints nor skin; lived principally in North Dakota and followed above occupation.

Family history: Father 58, has "stomach trouble"; mother 49, well; two brothers, two sisters, well; one brother died, meningitis; no history of tuberculosis, syphilis, malignancy, diabetes, nerv-

ous nor mental diseases; father has sick headaches; no consanguinity. [73]

History after service and present illness: Gas bothered principally in lungs while in hospital, slight cough and pains in chest; was apparently in good condition upon leaving service, though was slightly under weight; had some cough which was slightly productive in mornings and at no other time of the day; was not sick but "didn't feel like working" during the past year out of service; in June, 1920, developed pneumonia and empyema and was sick in bed two weeks ("drew pus out of chest twice with a needle"); was awarded total disability which continued until

8. Subjective symptoms:

October, 1920, when started vocational training, which continued until Sept. 1, 1921; during this time lost some weight, but felt well; had slight cough and upon examination training was discontinued, following an X-ray and other study of chest at Boise Hospital; since that time has been doing nothing as has been awarded total disability again.

Present complaint: Coughs up a little gray substance in the mornings, especially if has a cold, and will also cough at other times during the day, but not very much; feels weak and nervous; has had no fever of which he knows; has never had night sweats; eats very well, though sleeps rather poorly, staying awake several hours each night; is about 15 pounds below normal weight; sometimes when goes to bed can hardly get his breath.

9. Physical examination: 72 inches tall; weighs 160 lbs., which is about 15 lbs. below normal; highest during past year 165, in Jan., 1921; lowest during past year 154 lbs. in Oct., 1921; well developed, fairly nourished, good complexion; seems rather "hollow eyed" and anxious; temperature, 98.4.

Scalp and calvarium: Normal. [74]

E. E. N. T. report of specialist: "Eyes R. 20/20, L. 20/20, Ears R. O. K. normal hearing. L. O. K. normal hearing. Nose: Deflected septum. Nasopharyngeal catarrh. Throat: Tonsils enucleated, 3 yrs. J. Clothier."

Teeth: Dental report: Caries present Nos. 1-2-15-18-30-31. Salivary deposits, Gingivitis. Balance of teeth apparently normal. A. M. Jacobsen."

Lymphatics: Cervical nodes slightly enlarged equally bilaterally.

9. Physical findings: (Claimant must be stripped.) For tuberculosis examination see page 4. If an X-ray examination has been made, give the date, place and authorship of the radiogram.

Lungs: Chest is full, fairly developed and muscled, slightly drooping shoulders, s. c. spaces slight depressed equally bilaterally; expansion is good, though seems to be slightly less on left; 32½-37; some lagging of left chest; fremitus seems to be slightly diminished upper left posteriorly; resonance normal and equal throughout; auscultation shows slightly increased inspiratory harshness lower left posteriorly into left axilla, slightly cog-wheel in character; no other adventitious sounds

nor rales demonstrable on normal nor deep breathing nor following expiratory cough, with special and repeated attention to apices, axillae and other points of election (claimant has an acute rhinitis at present).

Circulatory: Heart, p. m. i. 9 c. m. m. l. s. 5 i. s. well outlined to inspection and palpation, no thrill, regular, 88, cardiac dullness 9 c. m. m. l. s.; auscultation shows both sounds at p. m. i. of fair quality, no murmur, regular, A2 equals P2. Blood pressure sitting 126-80, standing 138-94, no dyspnea, edema, [75] cyanosis nor congestion. After exercise pulse 100, 1" 92, 2" 86, no remarkable nor continued dyspnea, edema, cyanosis nor congestion.

Digestive: Tongue clean, moist; abdomen flat, well muscled, no lasses, hernia, hemorrhoids nor points of tenderness.

Vision—(Snellen chart)—Uncorrected R. 20/20, L. 20/20. Corrected by claimant's glasses R. 20/, L. 20/.

Hearing—(spoken voice)—R. 20/20, L. 20/20.

G. U. No scars nor varicocele, epididymis normal; urine, normal.

Nervous: Cranial nerves normal; station and gait normal; no tremor nor clonus; reflexes: bi., Abd., Crem., normal and equally active bilaterally; KJ and Ach. greatly exaggerated equally bilaterally.

Bones and joints: First degree flat foot, which is bothersome.

10. Diagnosis: Prognosis: Good.

Acute Rhinitis 1041.

Pes Planus (symptomless) 952.

(No evidence of existing nor previous pulmonary involvement.)

Dental Caries 182.

Gingivitis 475.

11. Is claimant able to resume his prewar occupation? No.

12. Is claimant bedridden? No. Able to travel? Yes. Unattended? Yes.

13. Do you advise hospital care? No. Will claimant accept hospital care? Yes.

14. Has claimant a vocational handicap? (See par. 14, "Instruction.") Minor. [76]

15. Is his physical and mental condition such that training is feasible? Yes.

Name C. H. Sprague, M. D. Title P. A. S. (R) USPHS. Address Pocatello, Ida.

TO BE FILLED OUT IN DISTRICT OFFICES.

This report is in response to U. S. Veterans' Bureau request of Oct. 29, 1921.

In my opinion the disability is.....due to service. Training is.....feasible. The applicant has.....a vocational handicap. Follow-up report is.....necessary every.....days.

This claimant was hospitalized in.....
 Hospital, commencing (date).....
 Date.....
District Medical Officer.
 District No.....

SPECIAL TUBERCULOSIS REPORT.

(In cases of suspected pulmonary tuberculosis, the following information must be furnished in addition to other data in this report.)

Height, with shoes, 72 inches. Weight (without coat) 160. Did you weigh the man yourself? No. Normal 175. Highest (lbs.) 165, Jan., 1921. Lowest (lbs.) 154, Oct., 1921. Sputum: Positive or negative? Negative. If negative, how many specimens were examined? None.

EXAMINATION OF CHEST.

Shape: Full, fairly developed, slightly drooping shoulders.

Mobility: S. c. spaces very slightly depressed. Expansion is good, though seems to be a little less on left.

Palpation: Fremitus: Fremitus seems to be slightly diminished upper left posteriorly. [77]

Percussion: R. lung: Resonance normal and equal bilaterally. L. lung:

Auscultation: R. lung: Auscultation shows slightly increased inspiratory harshness lower left posteriorly into left axilla, slightly cogwheel in

character; no other adventitious sounds nor rales demonstrable on normal nor deep breathing nor following expiratory cough.

L. lung:

Summary: Here indicate areas of infiltration, consolidation, etc., lobe by lobe:

No evidence of existing nor previous pulmonary involvement.

Diagnosis: ~~Tuberculosis, chr. pulmonary (?)~~
1241. Arrested.

Classification (National Tuberculosis Association standards):

Condition.—Active, quiescent, apparently arrested, or arrested. (Underscore the condition found.)

Stage.—Incipient, moderately advanced, or advanced. (Underscore the stage found.)

Name of examiner: Dr. C. H. Sprague, M. D.
Address Pocatello, Idaho.

Harry D. McCleary

(VETERANS' BUREAU.)

Office of District Manager District No. 13.

UNITED STATES VETERANS' BUREAU.

Seattle, Wash.

January 5, 1921.

Harry D. McCleary

C-435834

Twin Falls, Idaho.

C. H. Sprague,

P. A. Surgeon, USPHS,

Pocatello, Idaho.

Sir:

1. Reference is made to report of physical examination [78] dated December 10th, of the above named claimant, in which a diagnosis of tuberculosis, chronic, pulmonary, is made. The evidence as submitted is insufficient for this diagnosis, and you are requested to make the necessary correction and expedite return of the examination to this office.

Respectfully,

L. C. Jesseph,

District Manager.

By Paul I. Carter,

Surgeon (R) USPHS,

District Medical Officer.

First Indorsement.

To District Manager, attention District Medical Officer, Seattle, Washington, from Local Medical Officer, Pocatello, Idaho, Jan. 23, 1922.

1. I am returning herewith physical examination of above named claimant. You will note corrections made as per your request.

Respectfully,

Dr. C. H. Sprague,
P. A. S. (R) USPHS.

The WITNESS.—Exhibit 6 is a part of the records of the United States Veterans' administration. It is the certificate from Dr. Blair, San Jose, California, under date of September 3, 1924.

Mr. EVANS.—We offer Defendant's Exhibit 6.

Mr. MAHAN.—No objection.

And thereupon without objection was received in evidence the instrument identified as and marked Defendant's Exhibit 6, as follows: [79]

DEFENDANT'S EXHIBIT 6.

DR. J. C. BLAIR

801 First National Bank Building
San Jose, Cal.

September 3, 1924.

To all concerned:

This is to certify that Mr. Harry D. McCleary was under my medical care from September 5, 1923, until October 1, 1923. He was suffering with pleurisy and rheumatism.

J. C. Blair.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—Exhibit 7 is a part of the official records of the United States Veterans' Administration in the case of Harry D. McCleary, being the Report of Physical Examination made in San Francisco, California, by Dr. Martin J. Seid, May 23, 1924. I know Dr. Seid personally, and know his signature. I know him to be a qualified physician, he was one of the T. B. experts of the San Francisco office when I was District Medical Officer. He was working under my supervision. I know that the whole report, except for the form part, is in his own handwriting.

Mr. MAHAN.—We make the same objection to that that we made to the first exhibit.

The COURT.—Well, for the reasons heretofore given,—this is the record of the United States, and it is entitled to all presumptions of regularity,—the objection will be overruled.

Mr. MAHAN.—Exception.

Exception noted.

The COURT.—Is there a date on this document at all?

Mr. EVANS.—Isn't the date at the head of it? For [80] convenience I penciled the date at the top. The date is in the body of it somewhere.

The COURT.—Well, I don't see any date anywhere, but it identifies the time by stating where he was employed.

Mr. EVANS.—If it please the Court the date is in answer to question 22 on the top of the page there.

Thereupon, over the objection, was received in evidence the instrument referred to, identified as and marked Defendant's Exhibit 7, and as follows:

DEFENDANT'S EXHIBIT 7.

REPORT OF PHYSICAL EXAMINATION.

C. No. 435834.

1. Claimant's name: McCleary, Harry D. M.
2. Service, rank and organization: Pvt. 168th Inf.
3. Present address: 165 Turk St., San Francisco, Calif.
4. Age 27.
5. Color W.
6. Principal prewar civil occupation: Laborer.
7. Date of induction: 3/30/1917.
8. Date of discharge 5/9/1919.
9. Brief history of claimant's disability during service: Was "gassed" in 1918. Influenza. Hospitalized for 9 months. Regular discharge. Medical and industrial—since discharge. (Use reverse side.)
10. Present complaint (subjective symptoms, not diagnosis): No cough, no expectoration, has night sweats—pains in chest—appetite good—is losing a little weight—stomach o. k.—bowels constipated—tires easily—feels feverish in P. M.
11. Physical examination: (Claimant must be stripped. For tuberculosis examination use other side. If an X-ray examination [81] has been made,

give the date, place, authorship and interpretation of radiogram.)

Well built, fairly well nourished, skin clear, good color.

Pupils equal, react to light and accommodation, no exophthalmos.

Teeth good, pharynx normal. Thyroid—no palpable—no tremors—no glandular enlargement. Pulse 76, regular in force and rhythm—heart—A C D within normal limits—heart sounds clear—no palpable thrill. Blood pressure—112/70. Abdomen and genital—negative. Wasserman—negative. X-ray—see report. Urine—negative.

Vision (Snellen chart): Uncorrected R. 20/, L. 20/. Corrected by glasses: R. 20/, L. /20.

Hearing (spoken voice): R. /20, L. /20.

12. Diagnosis: No pulmonary pathology found.

13. Prognosis: Good.

14. Is claimant able to resume his prewar occupation, in your opinion? Yes.

If not, state why.....

15. Is claimant bedridden? No.

16. Is claimant able to travel? Yes.

17. Do you advise hospital care? No.

18. Will claimant accept hospital care? Yes.

19. Is an attendant necessary? No.

20. Is his physical and mental condition such that vocational training is feasible? Yes.

21. Did you examine the man yourself on this date? Yes.

22. Place: U. S. V. B., S. F., Cal. Date: May 23, 1924. Name: M. J. Seid, M. D. Title: Asst. Surg. (R.)

Medical and industrial history since discharge: [82]

Any acute intercurrent illness? Yes—broncho-pneumonia in 1921, followed by empyema.

Names of all physicians who have treated claimant Dr. Alexander at Twin Falls, Idaho, in 1921. When? 1921.

In what hospitals, when and where? None.

Employed continuously? No. When and where?

Employed at present? Yes. Amount of wages per month \$135.00.

Name of employer: Pomovin Corset Co., 951 Market St.

Nature of employment: Window trimmer and show card writer.

Amount of time lost on account of sickness: Two years.

Nature of disease: Chest trouble.

If not employed at present, why?.....

Any additional remarks?.....

SPECIAL TUBERCULOSIS REPORT.

(In cases of suspected tuberculosis, the following information must be furnished in addition to the report on the other side of the sheet.)

If the man has been treated since discharge from military or naval service, give the name and address of hospital or physician, with dates, and the disability for which he was treated. In recording the physical examination use form below, filling in all blanks carefully:

Temperature 98 deg. F. Pulse 76. Time of examination 2:00 P. M.

Height, with shoes, 73 inches. Weight (without coat) 170½. Did you weigh the man yourself? Yes. Normal 175. Highest 175 (2 mos. ago) lbs. Lowest 165 lbs. (6 mos. ago). Sputum (positive or negative) not obtainable. If positive, how many specimens were examined? [83]

EXAMINATION OF CHEST.

Shape: Long, flat over upper part. Mobility: Both sides move freely and equally.

Palpation: Fremitus: Increased over right side.

Percussion: R. lung: DR over apex only. L. lung: No impairment.

Ascultation: R. lung: Harsh breath sounds over upper lobe. No rals. L. lung: Breath sounds normal. No rals.

SUMMARY: Here indicate areas of infiltration, consolidation, etc., lobe by lobe:

Is claimant taking prevocational training? No.

How many hours a day?

Diagnosis:

Classification (National Tuberculosis Association Standards).

Condition.—Active, quiescent, apparently arrested or arrested. (Underscore the condition found.)

Stage.—Incipient, moderately advanced, or advanced. (Underscore the stage found.)

Name of examiner: M. J. Seid, Ass't Surg. (R).

Address: U. S. V. B., S. F., Cal.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—Exhibit 8 consisting of three sheets, being the report of Dr. J. G. Hefflewhef and Dr. Joseph S. Hart, under date of September 18, 1924, is an examination report, and a part of the records of the United States Veterans' Administration. The third sheet is the report from the Roentgenologist; at that time the blanks did not provide for the x-ray reports on the regular 215, and it was placed on a separate sheet.

Mr. EVANS.—We offer Exhibit 8.

Mr. MAHAN.—Well, we make the same objection, and further [84] add the objection that it is the conclusion of these doctors. We make the further objection, if it please the Court, that it is not shown that any attempt was made here to bring these doctors into court.

The COURT.—I know, but these are public records. What is this last one here attached.

Mr. EVANS.—An x-ray report.

The COURT.—What did you call that?

A. Roentgenologist.

Mr. EVANS.—What is that?

(Testimony of Dr. Herbert C. Watts.)

A. A man skilled in the art of taking and developing x-ray pictures.

The COURT.—Oh, he is a photographer. Why didn't you call him that. Admitted.

Mr. MAHAN.—Exception.

Exception noted.

And thereupon over the objection was received in evidence the report identified as and marked Defendant's Exhibit 8, being as follows:

DEFENDANT'S EXHIBIT 8
REPORT OF PHYSICAL EXAMINATION

C. No. 435834

1. Claimant's name: McCleary, Harry Dewitt M.
2. Service, rank, and organization: Pvt. 168th Inf. Co. Hdqrs.
3. Present address: 237 Leavenworth St., San Francisco, Calif.
4. Age, 27.
5. Color: w.
6. Principal prewar civil occupation: Laborer.
7. Date of induction: 3/29/1917.
8. Date of discharge: 5/9/1919. [85]
9. Brief history of claimant's disability during service:

Was hospitalized in France in 1918 for "gas" and influenza. Regular discharge.

Medical and industrial—since discharge. (Use reverse side.)

10. Present complaint (subjective symptoms, not diagnosis).

Pains in chest (when he breathes). No cough—considerable production 1-6 oz. Appetite good. Bowels somewhat constipated. Not losing weight. Feels like he has fever at times. Occasional night sweats. Tires easily.

11. Physical examination: (Claimant must be stripped. For tuberculosis examination use other side. If an X-ray examination has been made, give the date, place, authorship, and interpretation of radiogram.)

Well developed, fairly well nourished man of 27 years. Skin clear—not moist.

Head: pupils equal, reg. & react to 1 & a. Ears: neg.

Mouth: Teeth good. Tongue furred. Tonsillar fossa shows some tonsillar tissue (tonsillectomy in 1919). Throat neg.

Neck: Small discrete (bilateral) adenopathy anteriorly.

Thyroid not palpable.

Chest, heart, apex beat 6 rib inside nipple line sounds reg. No murmurs. Pulse 78. BP 120/78
P. P. 52.

Abdomen: No tenderness or rigidity. No masses.

Genitals & Rectum neg.

Extremities: neg.

Reflexes: knee jerks not accentuated.

Vision (Snellen chart): Uncorrected, R-20/ L-20/.
Corrected by glasses, R-20/ L/20.

Hearing (spoken voice): R- /20 L- /20.

12. Diagnosis: Ch Pul. Tbr arrested. [86]

13. Prognosis:

14. Is claimant able to resume his prewar occupation, in your opinion? Yes. If not, state why.....

15. Is claimant bedridden? No.

16. Is claimant able to travel?.....

17. Do you advise hospital care? No.

18. Will claimant accept hospital care? Yes.

19. Is an attendant necessary? No.

20. Is his physical and mental condition such that vocational training is feasible? Yes.

21. Did you examine the man yourself on this date? Yes.

22. Place: San Francisco, Calif. Date: 9/18/24.

Name: J. G. Hepplewhef, M. D. Title.....

Jos. S. Hart.

Medical and industrial history since discharge:

Any acute intercurrent illness? Yes. Broncho-Pneumonia in 1921, followed by empyema.

Names of all physicians who have treated claimant: Dr. Alexander at Twin Falls, Idaho, in 1921. When? 1921.

In what hospitals, when and where? None.

Employed continuously? No. When and where?
.....

Employed at present? Yes. Amount of wages per month, \$135.00 per mo.

Name of employer: Pommin Corset Co., 951 Market St., San Francisco, Calif. Nature of employment: Window trimmer & show card writer.

Amount of time lost on account of sickness: 2 yrs.

Nature of disease: Chest trouble.

If not employed at present, why?.....

Any additional remarks: None. [87]

SPECIAL TUBERCULOSIS REPORT.

(In cases of suspected tuberculosis, the following information must be furnished, in addition to the report on the other side of the sheet.)

If the man has been treated since discharge from military or naval service, give the name and address of hospital or physician, with dates, and the disability for which he was treated. In recording the physical examination use form below, filling in all blanks carefully:

Temperature: 36.8 c. Pulse: 78. Time of examination: 10:30 A. M.

Height, with shoes: 73 inches. Weight (without coat): 170.

Did you weigh the man yourself? Yes. Normal, 170. Highest, 175 lbs. Lowest, 160 lbs.

Sputum (positive or negative): Not obtainable. If positive, how many specimens were examined?

.....

EXAMINATION OF CHEST.

Shape: Full. Mobility: Free & gnal.

Palpation: Fremitus: S1 increased on right side.

Percussion: R. lung D R in upper chest especially noticeable over clavicle & axillary base.

L. lung: Negative to percussion, except axillary (Post) base.

Ascultation: R. lung: Slight harshness to breath sounds at apex—no rales.

L. lung: Negative to rales. Breath sounds somewhat harsh at apex.

“X” ray Report attached: J. G. Hefflewhef.

Recommend 10%, on chest findings.

J. G. Hefflewhef, JGH.

Spec. N. P. Report attached: J. G. Hefflewhef.

[88]

SUMMARY: Here indicate areas of infiltration, consolidation, etc., lobe by lobe:

Is claimant taking prevocational training?.....

How many hours a day?.....

Diagnosis: Ch. Pul Tb.

Classification (National Tuberculosis Association Standards).

Condition.—Active, quiescent, apparently arrested or arrested. (Underscore the condition found.)

State.—Incipient, moderately advanced, or advanced. (Underscore the stage found.)

Name of examiner.....Address.....

UNITED STATES VETERANS' BUREAU

Department of Roentgenology.

San Francisco, California, 5/23/24

X-Ray Report of McCleary, Harry D.

C#435834 File No. 5925

Examination: Chest. Ref. by Dr. Seid.

Diagnosis and remarks: The excursion of the diaphragm is free. The apices are hazy but light up fairly well. The right hila is large. There is a large amount of peribronchial thickening extending into the lower right lobe. There is some dilatation of the bronchii in the upper right lobe. There is a moderate amount of peribronchial thickening on the left. There are a few dense glands in the hila, bilateral.

Conclusion: Chest is negative except as above mentioned.

Stacy B. Hall, M. D.,
Roentgenologist.

(Testimony of Dr. Herbert C. Watts.)

Q. Referring, Dr. Watts, to the testimony in the deposition of Dr. Alexander I will ask you whether the reports which the Veterans' Administration have in any way give a different diagnosis or con- [89] tradict, and in what manner they contradict, the conclusions of Dr. Alexander as to the existence of active tuberculosis in McCleary in 1920?

MR. MAHAN.—I would like to find out if you have any particular examination at the same period

(Testimony of Dr. Herbert C. Watts.)

of time. I object to the comparison; he has the right to recite any facts or statements shown by these exhibits but they are * * *

The COURT.—* * * What are you asking?

Mr. EVANS.—I am asking whether there is a difference in opinion between Dr. Hal Bieler and Dr. Alexander, who testified this morning, at the same time and place, as to the diagnosis of active tuberculosis in 1920.

The COURT.—In reference to Dr. Bieler's report there?

Mr. EVANS.—Yes, your Honor.

The COURT.—Oh, I think they show for themselves. I don't think the Doctor, as a witness, is called upon to state that. You can point it out yourself. The objection will be sustained.

Q. How does the diagnosis made by Hal Bieler on June 19, 1920, the diagnosis being "bronchial asthma; pleurisy, chronic, fibrous, with effusion; possibly T. B.," differ with that diagnosis made of Harry McCleary by Dr. Alexander in 1920, at the same time?

Mr. MAHAN.—Objected to on the ground that the difference is shown.

The COURT.—Why, I think so. Why ask this witness. Sustained.

Q. You heard the testimony read in the deposition, Doctor, did [90] you not, this morning, Dr. Alexander's?

A. Yes, sir.

(Testimony of Dr. Herbert C. Watts.)

Q. And in that testimony it was stated that the diagnosis was that his pleurisy with effusion was probably due to tuberculosis. The testimony of Hal Bieler in Exhibit 1 shows that he was suffering from pleurisy, chronic, fibrous, with effusion, and bronchial asthma, possibly T. B. Will you explain to the Court and jury what the difference between bronchial asthma and pleurisy with effusion is, from the diagnosis made by Dr. Alexander?

Mr. MAHAN.—Objected to on the ground that it is an incorrect statement of fact contained in the deposition of Dr. Alexander. He didn't state in that deposition that it was probably tuberculosis.

The COURT.—Sustained. If you want the Doctor to explain bronchial asthma he may.

A. Bronchial asthma means a little spasm of the bronchi, which are the small tubes which lead to the air cells. It may be caused by a number of things, but that of itself would not be tubercular. Chronic pleurisy, with exudation, if you are asking about that, might or might not be tubercular.

Q. Having access to the testimony of both Hal Bieler and Dr. Alexander what is your opinion as to whether it was or was not tubercular?

Mr. TOOLE.—That calls for the opinion of one witness based on the opinion of others.

The COURT.—Sustained.

Mr. EVANS.—Exception.

Exception noted.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—As to the disabling effects of active tuberculosis, in answering that you have to qualify it. A man might [91] have active tuberculosis and be able to carry on very well, and he might have active tuberculosis and be able to carry on a light occupation. He might have active tuberculosis and not be able to move out of his bed. Just active tuberculosis, by itself, wouldn't give you any index as to the disabling part.

Q. When, in your opinion, was the tuberculosis, in the case of McCleary, totally disabling, as shown * * *

Mr. MAHAN.— * * * Objected to as not based on any statement of fact in the record.

The COURT.—Sustained.

Mr. MAHAN.—This man is not qualified.

The COURT.—Sustained.

Q. It has been testified that Mr. McCleary was totally disabled and bedridden for several weeks in 1920, and that that disability or trouble was due to his lung condition at that time. In your opinion was that such a condition, as shown by the evidence, to be at that time permanently and totally disabling? That is, was it reasonably certain that the condition of the lungs from which he suffered in 1920 would continue throughout the balance of his lifetime, as shown by the testimony of Dr. Bieler and Dr. Alexander?

Mr. TOOLE.—That is objected to because it assumes a state of facts not properly before this Court.

(Testimony of Dr. Herbert C. Watts.)

The COURT.—Sustained.

Mr. EVANS.—Exception.

Exception noted.

There was no cross-examination, and the
Witness excused.

Thereupon counsel for defendant announced the
defendant rests. [92]

Mr. MAHAN.—No rebuttal testimony.

And thereupon the testimony was closed.

The COURT.—Well, you may renew your motion.

Mr. EVANS.—If it please the Court we do renew our motion.

The COURT.—I will hear it argued.

Thereupon the respective counsel presented to the Court their arguments upon defendant's motion for a directed verdict, heretofore made and set forth in the record and renewed at this time.

Thereafter, at the conclusion of said arguments the matter was submitted, and thereafter the Court ruled on said motion for directed verdict as follows:

By the COURT.—Call in the jury. At the conclusion of all of the evidence the Government makes

the usual motion for a directed verdict on the general ground that the evidence is in such a state that if the case went to the jury and the jury found for plaintiff, in law the verdict could not be sustained,—the Court would be under obligation to set it aside. And that raises the question whether upon the whole evidence there is sufficient and substantial evidence to sustain such a verdict, providing the jury would find in the plaintiff's favor. All reasonable inferences that the evidence will bear must by the Court, as a matter of law, be considered most favorably against the moving party, the United States, and to favor the plaintiff, and having done so, if it is the Court's judgment that the evidence would not sustain a verdict for plaintiff, if the jury find one, it is its plain duty to take the case away from the jury and decide the motion in favor of the Government. The reason for this is [93] of course that whether or not there is any substantial evidence which would sustain a verdict for the plaintiff becomes a question of law and it is not a question of fact for the determination of the jury, and only when the Court decides against the motion do questions of fact arise for a jury's determination. And another reason for the motion is that in an appealing case such as this is juries are human, even as the Court is, but they are more susceptible to be moved by sympathy and less inclined to look at the case strictly from the standpoint of reason, but are motivated to some extent by sympathy, in general cases, to favor one whose situation is un-

doubtedly as bad as is the plaintiff's here. It must not be forgotten, however, that the plaintiff is not deserted by his Government even now, when he is totally disabled,—under total disability and permanent disability,—because we take judicial notice, even if it is not in the record, that the Government is caring for him through what is called compensation.

So now we come to the question of this case. What is the evidence? It seems that the plaintiff, in the war, took out an insurance policy. The United States was the insurer. These policies are like any others issued by any insurance company. They are contracts. Those who take out the policies must perform the conditions on their part; that is to say, pay the premiums, and if the contingency on which the policy is predicated, happens, he having paid his premiums to that time, then he would get his money, some Ten Thousand Dollars. The premiums were made very moderate. The Government always is the most liberal of any nation on earth with the soldiers. It provides an increased pay while in service, provides him with compensation if he is injured, cares for his family while he is away, and this in- [94] surance was a contract especially given to him that if he became totally and permanently disabled,—for that was the only contingency on the happening of which the Government obligated itself to pay,—if he became totally and permanently disabled while the policy was in force,—that is to say, while the premiums were be-

ing paid,—then the Government would pay the money,—and not obligated to, otherwise. This contract, like any other, if the insured person fails to pay the premiums before the contingency happened, it didn't help him any if afterwards the contingency happened, because then the policy had expired. Just as if you take out a policy with an insurance company against accident, you pay your premium; you quit paying it and the next week an accident happens; you have no right to claim anything from the insurance company because of that accident, after your forfeiture by default in the payment of your premiums.

Now the plaintiff says in this case that he did not default; that when he had ceased to pay premiums, as he did, on the first of July, 1919, that already he was totally and permanently disabled; and if he was he is entitled to his money. The Government on the other hand says "No, he was not then totally and permanently disabled, though he is now." No matter how sad his condition now is, unless his proof is that he was totally and permanently disabled on July 1, 1919, and of course all the time since, hard as his condition may be, he is entitled to nothing on this policy. He is the one that has been at fault. And moreover, the difficulty of proof, reference to which has been made on behalf of the plaintiff, it must be remembered that no matter how difficult the proof is, anyone that comes into court and asserts a claim must prove it, and if he has not the ability to secure the evidence to prove it that

is his hard luck, and due in fact to his own failure to keep up his premiums until he asserted his claim and made his proof. [95]

The evidence will show in this case that the plaintiff never asserted to the Government that he was totally and permanently disabled and claimed the insurance until 1930, some eleven years after he had left the army and quit paying the premiums.

Now what is the evidence? He was gassed during the war, some kind of gas; sent to the hospital; he was in the hospital a large part if not all the time between the fall of 1918 until he was discharged in May, 1919, so he testifies, and it must be accepted, in the circumstances. He was discharged, and took a discharge which states that he was in good physical condition; no evidence that he made any claim then that he was suffering any disability of any kind. He comes home. The moment he leaves the army he fails and defaults in the payment of premiums on this policy. He had no idea himself of course,—that is, positive,—that he was then totally and permanently disabled because if he had been he would have walked up and demanded his money from the defendant and on proof made would have gotten it. Of course that does not debar his right of recovery if in fact he was then totally and permanently disabled. That summer he stayed at home, and a little later he presented a claim, not for this insurance, but for compensation, a gratuity which the Government gives to soldiers who have suffered any little disability in war, or

greater disability,—the fact is, I think, if he suffers any handicap,—to the extent of ten percent. He presented a claim for that compensation, according to the evidence, June 19, 1920,—June 19, 1920. He was then under the care of Dr. Alexander; that was more than a year after he had come home. And he then presented a claim for compensation, reciting what he had been doing, and making no claim whatever that he was totally disabled, much less permanently disabled; reciting some amount of work on the farm at Seventy-five Dollars a month, which he [96] does not remember now; something of carpenter work. It may be fair to say that it is improbable that he did any more work, if he did as much, as the average man on a small five-acre lot, perhaps just a garden piece, and he may not have done very much, if any. Under the treatment of Dr. Alexander he went to bed for some twelve days, if I remember right, maybe a little more,—May twenty-second to June eighteenth,—I think the Doctor testified some twenty-four or five days, three weeks,—and the Doctor now says that he diagnosed him clinically as tubercular; that he had some trouble of the pleural cavity requiring drawing off of some fluid, and some other symptoms the Doctor tells about. That he tested him for tuberculosis by testing the sputum, and found nothing in the sputum which indicated tuberculosis, though that is not conclusive,—a man may be actually tubercular and not disclose it in the sputum,—and regardless of that, clinically he had diagnosed him as tubercular. I don't know whether he placed that

in his record or whether it was a matter of his recollection,—it doesn't matter,—the Doctor now says, testifying, that at that time he diagnosed him as tubercular. After that the plaintiff, securing compensation, went to school at the Government's expense; at school he learned display card writing and the matter of display in dressing show windows, if I remember right, something of that sort, and he went for something like a year or maybe less, to a school, and was paid One Hundred Dollars a month, which of course would not debar him of his insurance if the conditions were met by him and he was entitled to it; and after that he went to work in Spokane for a time,—no, after he left school,—I think he was eight or nine months in training in Spokane, window display and card writing,—and after that he went to [97] California, to San Jose, and he says he worked about a year at card writing, off and on, a year,—and he got some thirty-five dollars a week for that. His wife says that he worked there about three years. He testifies as to his feeling sick, loss of energy, under weight, sweating, and that from the very beginning,—and over those three years, or whatever he remained there,—worked for Hale Brothers. His wife testified he worked ten months in San Jose, yes, at Thirty Dollars a week,—I think he said Thirty-five,—Thirty—Thirty-five,—then they went to San Francisco, and she testifies that he worked for the Pomin Corset Company, card display, same wages, for over three years; that he lost much time, and that he worked some time, which I don't remember just

what the amount of it was, for Hale Brothers, doing the same kind of work; some intimation he was not working all the time. Then for a while he went to work selling radios; and then afterwards he was examined by various doctors for the Government, who found no evidence of tuberculosis, until later on came a condition which disclosed that he was actively tubercular, I think in 1930 the Government classified him then as a total disability because of active tuberculosis—total disability and permanent; in other words, reasonably likely it will last forever. Now the question is whether this evidence, if it would go to the jury, would warrant the jury to find that when he ceased paying premiums on his insurance, July 1, 1919, whether he was then totally disabled and permanently disabled. Total disability means what it says,—substantially all,—disabled from being able to carry on any kind of labor by which he could earn a livelihood, and it is permanent when it is reasonably likely, in the circumstances, that it will last for a long time,—indefinitely, if not for [98] life. There can be nothing positive. Nothing can be certain. Nothing can be absolutely sure. So the law relies upon reasonable probability. The plaintiff is basing his claim upon the tuberculosis that existed in May and July, 1919, active tuberculosis. But the question then arises, suppose the proof is sufficient to hold that on July 1, 1919, which is almost a year before he sought the advice of any doctor as to his condition, suppose the evidence is sufficient to find that at that time he had active tuberculosis. Does that suffice to prove

that he was then totally disabled from earning a livelihood? Not twenty-five percent, not fifty percent, not seventy-five percent, but substantially all. And does the evidence disclose that at that time it was reasonably likely that condition would continue indefinitely, or did he have a prospect of a cure? The doctors tell us and we all know that active tuberculosis is curable, providing, as Dr. Hobson said, you take it early and follow the advice of your doctor. But he waited a year after he had quit paying premiums on his policy before he even went to a doctor, and then Dr. Alexander found it was active tuberculosis. Thereafter were his labors with the various companies mentioned, at substantial wages, and for three or four years, before he was finally down with what is now recognized as disabled,—active tuberculosis.

The courts have treated of this, and I can do no better than to read some of their language which sounds to me applicable to this case. In the case of Nicolay against the United States. Nicolay came home from the war in March, 1919. He went to his farm in Kansas and did a little farm work that summer. He was not strong,—that is the evidence; had a cough, raised mucous and blood, and the doctor then suspected the existence of tuber- [99] culosis and prescribed wholesome food; that was right after he came back from the army. His doctor testified he was not able to do steady, all-day work. In 1920 he took vocational training, and then attempted to look after chicken incubators, but the work was too heavy. In January, 1922, he

was x-rayed, and the findings were chronic, active tuberculosis of the left apex. Following that he went to New Mexico, where he was again examined with a finding of inactive tuberculosis. He returned from New Mexico to his home in Kansas and he did little or no work until 1925, that is, after 1923. In 1925 he worked for a contractor for about eight months but his condition was such that he was off from a third to one-half of the time, and still he did some work irregularly, running from two to seventeen hours a day, and he didn't work every day. And then it goes on to show that in sixteen months he worked some thirty-six hundred hours, which would be computed as usual four hundred and fifty days in sixteen months. That was late in 1926. Other short periods of employment after that, and at the time of trial he was recognized as tubercular, totally and permanently disabled.

Now the Court says, as I have said to you, and as we all recognize, it is not sufficient at the time of trial that he is tubercular and totally and permanently disabled, but the question is whether he was tubercular at the time in March,—that man had been gassed, too,—in 1918,—the question is whether in March when he stopped paying his premiums, whether he was then not tubercular alone, but tubercular to a degree that he was totally and permanently disabled. And here is what the Court says:

“We are of the opinion that there was evidence from which a jury might properly have

found that the [100] insured was totally disabled on May 2, 1919, when his premiums stopped; there was some evidence that he was then an active tubercular, and the record discloses what is coming to be a matter of common knowledge, that active tuberculars should have complete rest." "But," the Court says, "in addition to the disability being total, it must be permanent."

And then it goes on to give an illustration:

"If the insured had suffered a broken leg," on that day, "or had contracted the scarlet fever on that day,"—when the policy expired because he quit paying premiums,—“he would have been totally disabled while his policy was in force; but unless he disregarded the advice of his doctors no one would say that such a disability was permanent.”

The same regulations as to the definition. Then he goes on to say unless the plaintiff has produced some substantial proof that it was reasonably certain, on or before May 2, 1919, that his condition of total disability, by reason of the tuberculosis, was one that would continue throughout his life, the case was properly decided for the Government. "We cannot find any such evidence in the record. If, for the moment, we disregard the evidence as to the succeeding years,"—the work, and reports on his condition,—“we have at best an insured in the early stages of tuberculosis. It is a matter of common knowledge that many such incipient tubercu-

lars respond readily to the simple treatment of rest and nourishment; the activity is arrested, and while there probably always will be a susceptibility of recurrence, they are able to and do live out their lives following gainful occupations." Dr. Hobson said something [101] about that. "On the other hand there are some that do not respond to treatment and their condition is incurable from the start. The burden of proof is upon the plaintiff; if his evidence leaves it a mere matter of speculation as to the permanence of his total disability in May, 1919, he cannot recover." Then he cites from Judge Kenyon in a like case. The Court finally concludes that he had not sustained that burden of proof; that it was mere speculation whether at the time when he quit paying his premiums the tuberculosis, which it was there admitted rendered him totally and permanently disabled, was not curable. And that, the Court thinks, is a parallel case on practically all fours with the case before us here.

Let us concede, let it be granted, that he had tuberculosis when he left the army and when he quit paying premiums, on the first of July, 1919,—although there is no evidence by anyone that he actually had it until a year later, by Dr. Alexander,—there is no evidence that if he had been given the proper care, rest, treatment, at that time, that his case was not a curable one, and if that is so it is not a case of permanent disability, however total it might have been. Nicolay against the United States, 51 Federal, Second, 170.

Another case along the same line is that of United States against Harrison, in the 49th Federal, Second, 227, where Judge Parker refers to the fact also that while a man who has active tuberculosis may be considered at that time as totally disabled, yet that is no proof that he is permanently disabled, unless it so appears from the evidence. And he says, speaking of the man's work, a man continuing to work for a period of more than three years,—under circumstances generally irregular and intermittent, according to the testimony,—but even if we assume [102] that he had the disease at the time he quit paying the premiums, it does not follow that he was then totally and permanently disabled as a result thereof. Whether tuberculosis results in total and permanent disability depends on the facts of each particular case, and there is no sufficient evidence there.

Now in this case, as I see it, the hind sight is better than the fore sight. After all of these years the plaintiff is now totally and permanently disabled, but now that is no inference to warrant that at the time when he ceased paying these premiums he was totally and permanently disabled. The fault is his. If he had kept up his premiums until he asserted his claim, and made the proof, if he could make it, why he would have received his insurance,—but he comes in now, after thirteen or fourteen years that he hadn't paid the premiums, comes in at this late day and asserts that he was then permanently and totally disabled, and the burden is

his to prove it. He has failed, and the motion for a directed verdict on behalf of the Government is granted.

Mr. MAHAN.—May we have an exception?

The COURT.—Evidently, if you take it.

Exception noted.

Mr. MAHAN.—And may we have thirty days in addition to the usual time, to prepare a bill of exceptions?

The COURT.—You may.

Mr. MAHAN.—If your Honor please, may we have the exhibits left here for the reporter, so he can get out the bill?

The COURT.—If the other side agrees.

Mr. EVANS.—We agree, with this condition, that the exhibits may be copied and the originals returned to the records of the Veterans' Administration, if the Court so orders. [103]

The COURT.—Very well. Let that agreement be entered in the record.

The COURT.—The juryman on the end will step forward as foreman and sign the verdict. Remember that the Court is responsible for the verdict, and you sign it as a mere matter of form.

• Whereupon the foreman of the jury signed the verdict in favor of the defendant, as directed. [104]

The foregoing is, within the additional time allowed by the Court, submitted by the plaintiff as a proposed bill of exceptions in his behalf.

SMITH, MAHAN & SMITH,

HOWARD TOOLE,

W. E. MOORE,

Attorneys for Plaintiff.

Due and legal service and receipt of a copy of the foregoing proposed bill of exceptions are hereby acknowledge this 20th day of December, 1932.

WELLINGTON D. RANKIN,

D. L. EGNEW,

SAM D. GOZA, JR.,

D. D. EVANS,

Attorneys for Defendant. [105]

STIPULATION.

It is hereby stipulated and agreed by and between counsel for the respective parties to the foregoing entitled action, that the foregoing proposed bill of exceptions on behalf of the plaintiff is a full, true, complete and correct bill of exceptions as to the proceedings had and the evidence adduced in said cause, and that the same contains all of the evidence adduced in said cause; and that the same may be approved and settled and allowed by the Court, as provided by law.

Dated, this the 20th day of December, 1932.

SMITH, MAHAN & SMITH,

HOWARD TOOLE,

W. E. MOORE,

Attorneys for Plaintiff.

D. L. EGNEW,

D. D. EVANS,

Attorneys for Defendant. [106]

[Title of Court and Cause.]

United States of America,

District of Montana.—ss.

I, George M. Bourquin, a Judge of the above entitled Court, before whom the above entitled action was tried, do hereby certify: That the foregoing is a full, true, complete and correct bill of exceptions in said cause; that the same contains all of the evidence introduced and given upon the trial of said cause; and that the foregoing is now, by me, hereby settled as corrected, allowed and approved as a true and correct bill of exceptions in said cause.

Done in open Court this 31st day of December, 1932.

BOURQUIN,

Judge.

[Endorsed]: Filed Dec. 31, 1932. C. R. Garlow,
Clerk. [107]

Thereafter, on Feb. 6, 1933, notice of appeal was duly filed herein, in the words and figures following, to wit: [108]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To: United States of America, Defendant, and to Wellington D. Rankin, United States District Attorney, District of Montana; D. L. Egnew, Assistant United States District Attorney, District of Montana, and D. D. Evans, Chief Attorney, United States Veterans' Administration, Fort Harrison, Montana, Attorneys for Defendant:

You, and each of you, will please take notice that the plaintiff above named does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order, judgment, and decree entered and filed in the above entitled cause on the 3rd day of December, 1932, and that a certified transcript of the record will be filed in the said Circuit Court of Appeals within thirty (30) days from the filing of this notice.

SMITH, MAHAN & SMITH,
HOWARD TOOLE,
W. E. MOORE,
Attorneys for Plaintiff.

Service of the above and foregoing notice of appeal, and the receipt of a copy of the same is hereby acknowledged this 6th day of Feb. 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney, District
of Montana,

SAM D. GOZA, JR.,
Assistant U. S. District Attor-
ney, District of Montana,

D. D. EVANS,
Chief Attorney, Veterans' Ad-
ministration, Fort Harrison,
Montana,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow,
Clerk. [109]

Thereafter, on Feb. 6, 1933, petition for appeal was duly filed herein, in the words and figures following, to wit: [110]

PETITION FOR APPEAL.

[Title of Court and Cause.]

The plaintiff above named, feeling himself aggrieved by the order, judgment and decree made and entered in this cause on the 3rd day of December, 1932, does hereby appeal from said order, judgment and decree, and from each and every part thereof, to the Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the as-

signment of errors herein. The plaintiff prays that his appeal be allowed and that citations be issued as provided by law, and that a transcript of the record, proceedings and papers, upon which said order, judgment and decree were based, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, as by the rules of said Court in such cases made and provided.

SMITH, MAHAN & SMITH,
HOWARD TOOLE,
W. E. MOORE,
Attorneys for Plaintiff. [111]

Service of the above and foregoing petition for appeal, and the receipt of a copy of the same is hereby acknowledged this 6th day of February, 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney, District
of Montana,
SAM D. GOZA, JR.,
Assistant U. S. District Attor-
ney, District of Montana,
D. D. EVANS,
Chief Attorney, U. S. Veterans'
Administration, Fort Harri-
son, Montana,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow,
Clerk. [112]

Thereafter, on Feb. 6, 1933, assignment of errors was duly filed herein, in the words and figures following, to wit: [113]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now Harry D. McCleary, plaintiff in the above entitled action, by and through his attorneys, Smith, Mahan and Smith, Howard Toole and W. E. Moore, and in connection with his petition for appeal herein and the allowance of the same, assigns the following errors which he avers occurred in the trial of said cause and which were duly excepted to by him at the time of trial herein, and upon which he relies to reverse the judgment herein:

I.

That the District Court erred in granting defendant's motion for a directed verdict, made at the close of all the testimony, the granting of which motion was duly excepted to at the time.

II.

That the District Court erred in directing the verdict for the defendant, to which error the plaintiff took due and timely exception.

III.

That the District Court erred in receiving and filing the directed verdict for the defendant, to

which error the plaintiff took due and timely exception.

IV.

That the District Court erred in entering judgment upon [114] the directed verdict for the defendant, to which error the plaintiff took due and timely exception.

V.

That the District Court erred in admitting certain documentary evidence, to which error the plaintiff took due and timely exception.

VI.

That the District Court erred in refusing to admit certain opinion evidence, to which error the plaintiff took due and timely exception.

SMITH, MAHAN & SMITH,
HOWARD TOOLE,
W. E. MOORE,

Attorneys for Plaintiff. [115]

Service of the above and foregoing assignments of error and the receipt of a copy of the same is hereby acknowledged this 6th day of Feb., 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney,

SAM D. GOZA, JR.,
Assistant U. S. District Attorney,

D. D. EVANS,
Chief Attorney, Veterans' Administration, Fort Harrison,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow,
Clerk. [116]

Thereafter, on Feb. 6, 1933, order allowing appeal was duly entered herein, in the words and figures following, to wit: [117]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon application of the plaintiff herein,

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment heretofore entered herein and filed on the 3rd day of December, 1932, be and the same is hereby allowed;

IT IS FURTHER ORDERED that the amount of the bond be fixed in the sum of Two Hundred Dollars as security for defendant's costs on appeal, and it is so ordered; and

IT IS FURTHER ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings, be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

Done this 6 day of Feb., 1933.

BOURQUIN,
United States District Judge. [118]

Service of the above and foregoing order allowing appeal and the receipt of a copy of same is hereby acknowledged this 6th day of Feb., 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney, District
of Montana,

SAM D. GOZA, JR.,
Assistant U. S. District Attor-
ney, District of Montana,

D. D. EVANS,
Chief Attorney, U. S. Veterans'
Administration, Fort Harri-
son, Montana,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow,
Clerk. [119]

Thereafter, on Feb. 6, 1933, citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [120]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States to:

The United States of America, Defendant; Wellington D. Rankin, United States District Attorney, District of Montana; D. L. Egnew, Assistant United States District Attorney, District of Montana, and D. D. Evans, Chief Attorney, United States Veterans' Administration, Fort Harrison, Montana, Attorneys for the Defendant:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, California, in the Ninth Judicial Circuit, within thirty (30) days from the date of this writ, pursuant to an order allowing appeal filed in the office of the Clerk of the above entitled Court, appealing from the final order, judgment on directed verdict, and decree entered herein and filed on the 3rd day of December, 1932, wherein Harry D. McCleary is plaintiff and the United States of America is defendant; then and there to show cause, if any there be, why the order, judgment and decree rendered against the said appellant, as in the order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf. [121]

This 6 day of Feb, 1933.

BOURQUIN,
United States District Judge.

Attest:

.....
Clerk.

.....
Deputy Clerk. [122]

Service of the above and foregoing citation on appeal is hereby acknowledged, with the receipt of a copy of the same, this 6th day of February, 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney, District
of Montana,

SAM D. GOZA, JR.,
Assistant U. S. District Attor-
ney, District of Montana,

D. D. EVANS,
Chief Attorney, Veterans' Ad-
ministration, Fort Harrison,
Montana,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow,
Clerk. [123]

—————
Thereafter, on Feb. 6, 1933, praecipe for tran-
script was duly filed herein, in the words and figures
following, to wit: [124]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above Entitled Court:

You will please certify to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the following papers:

1. Complaint.
2. Answer.
3. Verdict.
4. Judgment.
5. Notice of appeal.
6. Petition for appeal.
7. Citation on appeal.
8. Order allowing appeal.
9. Assignments of error. [125]
10. Bill of exceptions.
11. This praecipe.

SMITH, MAHAN & SMITH,
HOWARD TOOLE,
W. E. MOORE,
Attorneys for Plaintiff.

Service of the above and foregoing praecipe and the receipt of a copy of the same is hereby acknowledged this 6th day of Feb., 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney, District
of Montana,

SAM D. GOZA, JR.,
Assistant U. S. District Attor-
ney, District of Montana,

D. D. EVANS,
Chief Attorney, U. S. Veterans'
Administration, Fort Harri-
son, Montana,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow,
Clerk. [126]

[Title of Court and Cause.]

CERTIFICATE OF CLERK.

I, C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, do hereby certify the foregoing transcript of pages numbered from 1 to 126 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of \$24.40 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 1st day of March, 1933.

[Seal]

C. R. GARLOW,
Clerk.

[Endorsed]: No. 7102. United States Circuit Court of Appeals for the Ninth Circuit. Harry D. McCleary, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed March 4, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth District.